SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
DEC 31 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-853

STANLEY M. GREENBERG, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BERNARD G. SEGAL
WILLIAM T. COLEMAN, JR.
JOHN R. McCONNELL

SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pa. 19102

DILWORTH, PAXSON, KALISH, LEVY & COLEMAN
2600 The Fidelity Building
Philadelphia, Pa. 19109

MORGAN, LEWIS & BOCKIUS
2107 The Fidelity Building
Philadelphia, Pa. 19109

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

INDEX TO PETITION

	Page
Opinions Below	1
Jurisdiction	1
Questions Involved	2
Constitutional and Statutory Provisions Involved	3
Statement	4
1. The Check Kiting Scheme	5
2. Petitioner's Relationship with Alper and Alper's Enterprises	8
3. Proceedings Below	9
Reasons for Granting the Writ	11
1. Petitioner's Conviction on the Record in This Case Amounts to a Denial of Due Process	12
2. Petitioner's Sixth Amendment Right to A Unanimous Jury Verdict Was Violated	22
3. The Inconsistency of the Verdict in This Case Deprived Petitioner of His Constitutional Rights Under the Fifth and Sixth Amendments	24
4. Petitioner's Sixth Amendment Rights and His Right Under Rule 43 of the Federal Rules of Criminal Procedure Were Violated by Instructions Given to the Jury While He Was Not Present	29
Conclusion	33

INDEX TO APPENDIX

	Page
Opinion and Order of the United States District Court	1a
Opinion of the United States Court of Appeals	15a
Order of the United States Court of Appeals	38a
Sur Petition for Rehearing	40a
Verdict	41a

TABLE OF CITATIONS

Cases: Page

Ashe v. Swenson, 397 U.S. 436 (1970) 28, 29

Bannister v. United States, 379 F.2d 750 (C.A. 5, 1967), cert. denied, 390 U.S. 927 (1968) 26

Bollenbach v. United States, 326 U.S. 607 (1946) 23

Chapman v. California, 386 U.S. 18 (1967) 31

Dunn v. United States, 284 U.S. 390 (1932) 27, 28

Evans v. United States, 284 F.2d 393 (C.A. 6, 1960) 29, 30

Garner v. Louisiana, 368 U.S. 157 (1961) 12

In Re: Stanley M. Greenberg, Judge, Court of Common Pleas of Philadelphia, 442 Pa. 411 (1971) 20

Johnson v. Florida, 391 U.S. 596 (1968) 12

Johnson v. Zerbst, 304 U.S. 458 (1938) 30

Kann v. United States, 323 U.S. 88 (1944) 26, 27

Krulewitch v. United States, 336 U.S. 440 (1949) 12

McNabb v. United States, 318 U.S. 332 (1943) 24

Montana v. Kennedy, 366 U.S. 308 (1961) 22

Sealfon v. United States, 332 U.S. 575 (1948) 28

Thompson v. Louisville, 362 U.S. 199 (1960) 12, 20

United States v. Crutcher, 405 F.2d 239 (C.A. 2, 1968). 30

United States v. DeCavalcante, 440 F.2d 1264 (C.A. 3, 1971) 19

United States v. Fioravanti, 412 F.2d 407 (C.A. 3, 1969) 23, 24

United States v. Fox, 433 F.2d 1235 (D.C. Cir. 1970) 28

TABLE OF CITATIONS (*Continued*)

Cases: Page

United States v. Grosso, 358 F.2d 154 (C.A. 3, 1963), reversed on other grounds, 390 U.S. 62 (1968) . . . 31

United States v. Musgrave, 444 F.2d 755 (C.A. 5, 1971) 21

United States v. Neal, 320 F.2d 533 (C.A. 3, 1963) . 30, 31

United States v. Schor, 418 F.2d 26 (C.A. 2, 1969) . . . 30

Ware v. United States, 376 F.2d 717 (C.A. 7, 1967) . . . 30

Windsor v. United States, 384 F.2d 535 (C.A. 9, 1967) . 21

Code:

18 U.S.C. §1341 15

Other Authorities:

Ashe v. Swenson: Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts, 71 Col. L. Rev. 321, n. 60 (1970) 27

Inconsistent Verdicts in a Federal Criminal Trial, 60 Col. L. Rev. 999 (1960) 28

Stern & Gressman, Supreme Court Practice (4th Ed. 1969), pp. 178-179 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ———

STANLEY M. GREENBERG, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Stanley M. Greenberg petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on September 14, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 16a-37a) and the opinion of the United States District Court for the Eastern District of Pennsylvania (App. 1a-14a) are, as yet, unreported.

JURISDICTION

The judgment of the Court of Appeals (App. 37a) was entered on September 14, 1971. A timely petition for rehearing was denied on November 2, 1971 (App. 40a). By order of Mr. Justice Brennan, dated December 1, 1971, the time within which to file this petition was extended for a period of thirty days. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

1. References to the appendix to this petition are designated "App." References to the appendix printed for the court below are designated "A." References to the transcript of the district court trial are designated "N.T."

QUESTIONS INVOLVED

Petitioner, a lawyer and now a judge, was convicted of a conspiracy to devise a scheme to use the mails to defraud banks. The same indictment charged petitioner, in 20 separate counts, with 20 separate acts which involved the same facts as those alleged in the general conspiracy count. The jury found petitioner innocent of each one of these separate acts. It found another defendant guilty of the conspiracy and of all of the acts but announced that it was "hopelessly deadlocked" with respect to petitioner and in fact marked a ballot in such a way as to indicate that, at some point in its deliberations, it found petitioner innocent on *all* counts. The trial judge sent the jury back to deliberate further and, several hours later, but only seventy minutes after the giving of a supplemental charge, the jury had struck the finding of "not guilty" of the general conspiracy count and checked instead the column "guilty," even though, as stated above, it found petitioner at the same time not guilty on each one of the substantive counts. The record contains no evidence whatsoever of any illicit act on the part of petitioner and any act done by the petitioner was both innocent and was the kind of act any lawyer would do for his client. Finally, months after the conviction, petitioner discovered for the first time that on two occasions the prosecutor and defense counsel had met with the trial judge in chambers to consider and respond to inquiries from the jury without petitioner's being notified or being present. Therefore the questions presented are:

1. Whether, in a prolonged trial against multiple defendants on a twenty-one count indictment, it was a denial of due process to send the case against petitioner to the jury and to permit the jury verdict to stand where there was no evidence that petitioner participated in, or knew of, any conspiracy or illegal scheme and where the evidence against petitioner showed nothing but innocent acts stemming from his attorney-client relationship with one of the other defendants.

2. Whether the course of procedure followed by the trial judge after the jury returned verdicts against two defendants, but announced itself "hopelessly deadlocked" as to petitioner, deprived petitioner of due process and his right to a unanimous verdict.

3. Whether the jury verdict against petitioner by its inconsistency—finding petitioner guilty on a conspiracy count based on precisely the same facts as the substantive counts as to which petitioner was found innocent—violated petitioner's right to due process and a unanimous verdict.

4. Whether petitioner's rights under the Sixth Amendment and Rule 43 of the Federal Rules of Criminal Procedure, were violated in that significant parts of the trial took place without the presence of petitioner and without his knowledge that they were taking place.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V, provides, in pertinent part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law. . . ."

United States Constitution, Amendment VI, provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . ."

Rule 43 of the Federal Rules of Criminal Procedure, provides, in pertinent part:

> "The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. . . ."

STATEMENT

On March 20, 1968, the twenty-one count indictment in this case was handed down. Count I charged that Frank Alper, Morton Feiner and Stanley M. Greenberg, along with one Maurice B. Hartsock, had conspired to commit an offense against the United States in violation of 18 U.S.C. §371. Hartsock had died in 1967. The offense which Alper, Feiner and petitioner were accused of conspiring to commit was intending to devise and devising a scheme to use the mails to defraud banks, in violation of 18 U.S.C. §1341.

The scheme to defraud charged in Counts II through XXI, the substantive counts, was identical with the scheme described in Count I. In fact, in Count I, the same facts which are the basis for Counts II through XXI are alleged as the basis of the conspiracy in Count I. Specifically, the indictment was based on a check kiting scheme operated from October 1964 to the end of June 1965 between various checking accounts controlled by Alper.

The basic issue here is whether petitioner, a lawyer when the acts complained of were committed and now a state court judge, was in any way involved in these criminal acts and whether his constitutional rights were violated because (a) he was convicted on the basis of *no* evidence

inconsistent with innocence, (b) the jury found as a fact in Counts II through XXI that petitioner was not involved with acts which form the basis of the conspiracy Count I, (c) the jury after reporting that it was hopelessly deadlocked was sent back pending a supplemental charge, forcing it into an erroneous verdict and (d) an important aspect of the trial took place in the absence of the petitioner without his consent. The relevant facts follow.

1. *The Check Kiting Scheme.* In 1961, Frank Alper, being employed in New York, decided to return to the Philadelphia area and establish his own sales companies. First, he started Magnum Chemical Corporation, then in 1962, Life Aid Corporation and in 1963, Trans-Ignition Systems, Inc., all located in Cherry Hill, New Jersey and operated from the same base. Each company offered a different product (waterproofing compound, a portable oxygen device, attachment for automobile ignition system), sold on the basis of trade acceptances with provision for installment payments.

Alper's close relationship with Hartsock, executive vice president of the Cherry Hill National Bank, began in 1961 when accounts in Magnum's name were opened in that bank and arrangements were made for discounting Magnum's trade acceptances. Until March, 1964, Alper was able to obtain a series of unsecured loans through Hartsock for Magnum's use (G. Ex. 16 A-B). The same procedure was followed when Life Aid was formed (G. Exs. 17 A-B, 52 A, 53). Hartsock arranged with the First National Bank of Stone Harbor, at Stone Harbor, New Jersey, for the handling of Trans-Ignition's business (N.T. 827-847). The company's account was opened there with the deposit of a cashier's check on the Cherry Hill National Bank signed by Hartsock.

In the spring of 1964, Hartsock's control position was threatened by a proposed merger of the Cherry Hill bank with the First Camden National Bank. In March 1964, he supported Alper in transferring the Life Aid and Magnum accounts to the Stone Harbor bank, telling the Stone Har-

bor executives that the Cherry Hill bank had had no problems with the accounts and urging a $15,000 loan to each company (N.T. 848-852, A. 193). The loans were approved in April. The accounts for the two corporations were opened in Stone Harbor, and the proceeds were used to cover overdrafts in the two corporations' accounts in Cherry Hill.

The proposed merger between Cherry Hill and First Camden took place on May 15, 1964 (N.T. 361-66). Thereafter, Hartsock became executive vice president of the People's National Bank of Camden County and Alper opened an account there in the name of F. & E. Alper (N.T. 1184-90).

Throughout the period here involved and until his ultimate exposure, Alper was regarded as an active and respected businessman. Joseph M. McCrane, currently Treasurer of the State of New Jersey, a former president of the Cherry Hill National Bank and prominent in many successful business activities, so testified as did numerous other witnesses.

However, by the spring of 1964, Alper's various business ventures were beginning to totter and, with Hartsock's assistance, he began to resort to desperate methods of raising needed money. Between August 1964 and March 30, 1965, Alper deposited People's cashier's checks signed by Hartsock in an amount slightly less than one half million dollars to cover shortages in the Stone Harbor accounts. He obtained these cashier's checks against forty-six checks drawn on the Magnum and Life Aid accounts in Stone Harbor, totaling a slightly greater amount (N.T. 1568-77). Beginning in October 1964, and continuing to March 30, 1965, Alper began a systematic exchange of checks between his personal account in People's National Bank and the Magnum and Life Aid accounts in Stone Harbor (N.T. 2966-68, 2986-88). This exchange was questioned by one of Hartsock's assistants and Hartsock directed that the checks be honored (N.T. 1509). Thereafter, all checks presented against uncollected funds were approved by Hartsock (N.T. 1460-66, 1514-15, 1532-33).

In March 1965, Hartsock was relieved of his duties at People's and a study was made of the Alper account. By March 30, the exchanges were stopped and Alper was given thirty days to straighten out the accounts (N.T. 1558-62).

Following this action by People's, Alper turned to check kiting of massive proportions. On April 1, 1965, he opened accounts at the Industrial Valley Bank in Jenkintown and, between that date and June 10, 1965, made over 160 check exchanges between those accounts and the Stone Harbor accounts (N.T. 2408-19). On April 26, 1965, he opened accounts at Fidelity-Philadelphia Trust Co. and, again, began a check exchange between those accounts and Stone Harbor. He gained control of a New York company named Stellar National Products Co. and its account in the First National City Bank of New York and began exchanging checks between that account and the accounts in Stone Harbor and at Fidelity-Philadelphia Trust Co. On June 15, 1965, he opened accounts at Central Penn National Bank and began exchanges between those accounts and the ones at First National City and at Stone Harbor.

On June 11, 1965, Industrial Valley Bank examined the accounts and discovered the cross-deposits. Alper was called in and warned that Stone Harbor checks deposited and totaling $130,000 must be honored or the FBI would be called in (N.T. 2432-43). The checks were honored. On June 23, 1965, First National City Bank refused payment for checks drawn on the Stellar account and discovered that two checks, totaling $32,000, which had been deposited in the New York bank were being returned unpaid. An examination of the account was made, all checks against it were returned unpaid, and all deposits were held solely for collection (N.T. 1756, 1762-64). Alper covered the $32,000 potential loss with a People's National Bank cashier's check signed by Hartsock which had been purchased with two checks drawn by Alper on Fidelity-Philadelphia which were, in turn, dishonored (N.T. 1764-68, 1592-94). By June 30, Central Penn had also ceased

to honor Alper's checks. First National City Bank of New York collected funds above the amounts necessary to cover its checks and, from the balance, saved Fidelity Philadelphia from potential loss. Central Penn recouped some money from this balance. As a result of the kiting scheme, the Stone Harbor Bank lost $27,000. People's lost $40,000 (consisting of the $32,000 cashier's check written by Hartsock and $8,000 on the F. & E. Alper account), and Central Penn lost approximately $190,000.

2. *Petitioner's Relationship With Alper and Alper's Enterprises.* Petitioner, as an associate of an older lawyer, first met Alper and did legal work for him in 1955. In 1958, when the older attorney died, petitioner carried on the practice including the representation of Alper. Between 1958 and 1961, petitioner did general legal work for Alper before Alper went to New York, including the liquidation of an unsuccessful record sales company, without compensation.

When Alper returned to the Philadelphia area from New York in 1961, petitioner, as counsel, took the necessary steps to form the various Alper corporations. When Magnum was formed in November 1961, petitioner became a director with Alper and Hartsock, and, beginning in March 1962, received, as a legal retainer, $100 a week, less withholding, from the company.

In June 1962, petitioner formed Life Aid for Alper and again became a director of the company, along with Dr. Orlando Campoli. Petitioner began receiving, as legal fees, $100 per week, less withholding, in August, 1962. Allen Reiter, secretary of the company, received $300 per week as sales manager.

During September, petitioner met with Joseph T. McCrane (as already mentioned, a prominent businessman, and at that time president of the Cherry Hill National Bank), Alper and Hartsock, to discuss the formation of a company to market an automotive ignition device (A. 364-367). Each was to invest $2,000. The loans were arranged by Hartsock and, on September 23, 1963, petitioner bor-

rowed $2,000 from the Philadelphia National Bank for his investment (A. 175-176). The proceeds were forwarded to Hartsock. The loan was repaid by petitioner in July, 1964. Petitioner took the necessary steps to form the corporation, Trans-Ignition Systems, Inc., and was to receive $100 weekly, less withholding (A. 388-389).

It is on the basis of the petitioner's relationship with these companies and their affairs that the prosecution charged that petitioner was bound into the check kiting conspiracy. The details of this contention will be discussed in the course of the argument.

3. *Proceedings Below.* Trial on the indictment commenced on March 3, 1970. Alper, through his attorney, offered to change his plea to guilty as to certain counts. The prosecution refused to agree unless Alper would agree to testify that the allegations in the conspiracy count as to petitioner were true. Alper asserted that petitioner knew nothing of the kiting scheme and refused to testify in the manner demanded by the prosecution (A. 117-18). Accordingly, Alper's plea of not guilty remained unchanged.

The trial lasted from March 3 to April 28, 1970. Alper and Feiner elected to remain silent. Petitioner testified at length with respect to representation of, and his dealings with, Alper (A. 288-562).[2]

Petitioner testified that he had no knowledge whatsoever of Alper's check kiting and that his only knowledge of the day-to-day financial operation of Alper's businesses was the information Alper gave him, consisting of financial statements prepared by a certified public accountant which showed the corporations to be active and profitable with substantial sales volume (A. 25-52). Petitioner's associates in the practice of law at the time of the events in question testified with respect to the nature of the legal services rendered to Alper by petitioner and his firm, and with respect to the value of the firm (A. 563-74, 592-606).

2. Petitioner had also cooperated in the investigative phases of this matter and had testified at length before the Grand Jury.

Numerous character witnesses appeared in petitioner's support.[3]

The jury began its deliberations on the afternoon of April 28, 1970 and recessed at 10:00 p.m. The following morning, at 10:35 a.m., the jury reported that it had reached a verdict as to Alper and Feiner, but it was "hopelessly deadlocked" as to petitioner (A. 634). The jury was brought to the courtroom and the court accepted its verdicts as to Feiner and Alper. Alper was found guilty on all counts and Feiner was acquitted on all counts.

The district judge told the jury that he was considering further instructions with respect to petitioner and sent it back to the jury room, stating that it would be brought back in a "very short time" (A. 642). At 1:10 p.m., the judge sent a note to the jury telling it to continue deliberations (A. 646-7). At 2:45 p.m., the jury was brought back and given a supplemental instruction (A. 654-656). At 3:55 p.m., the jury announced that it had reached a verdict (A. 656-657). Petitioner was found guilty as to Count I, the conspiracy count, and not guilty as to all other counts. The verdict slip had initially been marked not guilty on all counts (A. 53; App. 41a) but, at some point, the verdict of not guilty on Count I had been changed to guilty.

Motions for a new trial and judgment of acquittal were denied by the court on December 4, 1970. Sentencing took place on March 17, 1971 and notice of appeal was filed the same day. The court below affirmed the conviction. The nature of that court's opinion will be discussed in the course of the argument, *infra*.

3. See footnote 7, p. 26.

REASONS FOR GRANTING THE WRIT

The issues presented by this petition, discussed below, clearly establish that review by this Court is warranted. Petitioner was caught up in a long trial in which evidence was produced to show that violations of the mail fraud statute by persons other than petitioner had taken place and that the kiting scheme stemmed from a conspiracy between Alper and Hartsock. Petitioner was branded with complicity in the scheme. Yet, there was no evidence to show that petitioner agreed to, or even knew of, the check kiting scheme. Petitioner's conviction, in the circumstances, illustrates the ever-recurrent danger of trial on the charge of conspiracy and constitutes, in petitioner's case, a denial of due process. Further, important questions as to petitioner's constitutional rights and this Court's supervisory powers are raised by the procedures below in connection with the supplemental charge to the jury and the nature of the verdict ultimately returned. The jury, after reporting verdicts against the other two defendants and stating that it was "hopelessly deadlocked" as to petitioner, was sent out to deliberate further as to petitioner alone, a course of procedure that, coupled with a supplemental charge given, was clearly coercive. And the verdict finally reached by the jury was equally plainly a compromise.

These issues, as well as the question of the scope of petitioner's constitutional right to be present at all phases of the proceeding against him, are important in the administration of the criminal law. But there is another and fundamental question, not written down in the rules yet lying at the heart of the case. Petitioner's conviction rests ultimately on his relationship with a client and his only crime was not suspecting the client of wrongdoing. To permit this conviction to stand, with the consequence of totally destroying an able and highly respected lawyer and judge, would be a tragic miscarriage of justice.

I. *Petitioner's Conviction on the Record in This Case Amounts to a Denial of Due Process.* It is well settled that a conviction based on a record which lacks any relevant evidence as to a crucial element of the offense charged violates due process. *Thompson v. Louisville*, 362 U.S. 199 (1960); *Garner v. Louisiana*, 368 U.S. 157 (1961); *Johnson v. Florida*, 391 U.S. 596 (1968). Petitioner was here charged with conspiring to use the mails to defraud banks by means of a check kiting scheme. On this record, it is clear that there is no proof that he did so conspire.

Mr. Justice Jackson, in his classic concurring opinion in *Krulewitch v. United States*, 336 U.S. 440 (1949), described conspiracy as an "elastic, sprawling and pervasive offense . . . so vague that it almost defies definition . . ." 336 U.S. at 445-446. He pointed out that while, in theory, the prosecution must first establish the conspiracy, the accused, as a practical matter when trial begins, ". . . is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of the existence of the conspiracy itself. . . ." 336 U.S. at 453. And he emphasized that a ". . . co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrong-doing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. . . ." 336 U.S. 454.

By the time of the trial, Hartsock was dead. Feiner was a minor figure, having been employed by Alper as an accountant for only a few months before Alper's operations ceased entirely. Alper's offer to plead guilty was rejected by the prosecution because he refused to testify that the allegations of the conspiracy count were true as to petitioner.

The long trial began and the jury was confronted with masses of technical testimony and exhibits. Strong proof was furnished of the guilt of Alper and Hartsock. The

prosecution's theory, made explicit in its brief before the court below (p. 32), was that, once the conspiracy between Alper and Hartsock was established, only slight evidence was needed to connect petitioner with that conspiracy. Petitioner was confronted, to paraphrase Mr. Justice Jackson, with acts and statements by others which he never authorized, intended or even knew about. He testified candidly and at length, but the jury was unable to separate the evidence as to his relationship with Alper and Alper's affairs from the overwhelming mass of information dealing with the check kiting scheme between Alper and Hartsock.

Taken separately, there is no testimony as to petitioner's conduct in this matter which is not fully consistent with his innocence of any connection with the check kiting conspiracy. Indeed, some of the evidence affirmatively establishes that innocence. The prosecution's problem was to bridge the gap between petitioner's relationship with Alper and the check kiting conspiracy started by Alper and Hartsock in the fall of 1964 so as to establish petitioner's knowledge of and participation in that conspiracy. An examination of the evidence—a necessarily extended examination since it proves a negative—upon which the prosecution relied establishes conclusively that that gap was not and could not have been closed, and petitioner's motion for judgment of acquittal should have been granted.

(a). *The check exchange between petitioner and Alper in the fall of 1963.* The prosecution mainly relied, as circumstantial evidence to show petitioner's participation in the check kiting scheme, upon an exchange of checks between petitioner and Alper in the fall of 1963. The prosecutor referred to this exchange as ". . . the very heart of the case . . ." (A. 396). The court below called this incident the ". . . most incriminating evidence against Greenberg: the time when his personal account was used to kite checks with the Life Aid account." (App.

36a). Throughout its presentation in the courts below, the prosecution kept referring to this exchange as a kiting transaction, advancing this as the basis for a contention that petitioner should have known of Alper's propensity to kite checks.

The facts are these. In September, 1963, Alper called petitioner and stated that Life Aid trade acceptances had been deposited in the company's account at Cherry Hill but had not yet cleared (A. 360). He requested petitioner to give him a check for $2,500 and, in exchange, gave petitioner a Life Aid check in the same amount drawn on the corporate account at Cherry Hill. Alper assured petitioner that the Life Aid check would be paid when presented since, by then, the trade acceptances would have been credited to the Life Aid account (A. 361). Petitioner agreed and gave the requested check, marked it "loan," and deposited in his own account the Life Aid check in the same amount marked "repay loan" (A. 360-61). This exchange took place on September 5, 1963. Between that date and December 9, 1963, there were ten more such exchanges. The prosecution's expert witness testified that such transactions were not inconsistent with a loan agreement (A. 283-84). Adequate funds were made available in Life Aid's account to cover the Life Aid checks when presented for payment. All of the transactions complained of in this exchange took the same form and all checks cleared except the last when a stop order was placed on the Life Aid check and petitioner's check was returned (A. 531). No money was lost by either bank.[4]

In short, this was an innocent accommodation loan, and the jury so found. Count II, paragraphs 4 and 5, of the indictment charged the very same 1963 series of check exchanges as a scheme to use the mails to defraud in viola-

4. Petitioner drew his checks on his personal account at the Central Penn. The account was opened in 1961 and is active today (A. 146). A Central Penn executive testified that the bank would close the account of anyone who tried to cheat the bank or who managed his account improperly (A. 146).

tion of 18 U.S.C. §1341. On this point, the trial judge charged that no inference of wrongful intent arises when the person drawing the check has reasonable expectation that sufficient funds would be on deposit in the account to pay the check when presented (N.T. 4189-4190). He went on to charge that this reasonable expectation could include not only deposits which petitioner expected to be made in his account but also assets petitioner possessed which would enable him to cover the check in the event the anticipated deposits were not made or if the deposited Life Aid check was not honored by the bank upon which it was drawn. The jury found petitioner innocent, under this instruction, on the charge made against him in Count II, paragraphs 4 and 5.

There is, accordingly, nothing in the loans which petitioner made to Alper by way of an exchange of checks in 1963 upon which to base an inference that he knew of, and participated in, the check kiting scheme begun by Alper and Hartsock in the fall of 1964.

(b) *Payments received by petitioner from Alper's corporations.* Petitioner received $100 a week, minus withholding, from Magnum, Life Aid and Trans-Ignition after each of those corporations was formed until February, 1965. Initially, petitioner was a director in all these corporations but resigned his directorships in 1963 when he became Assistant Attorney General assigned to the Pennsylvania Securities Commission as General Counsel, and was under active consideration for judicial appointment (A. 350-351). The prosecution charges that these payments constituted petitioner's share of the fruits of the kiting conspiracy.

Petitioner testified that these payments essentially constituted an annual retainer paid on a weekly basis, minus withholding; to minimize the impact of his final tax payment when it became due (A. 328-331). Petitioner had a similar arrangement with another client (A. 331). There was testimony, both by petitioner and his law associates, as to the amount of legal work which had been done for Alper (A. 572-574, 593-595). Even putting aside the fact that

these payments were in recognition of legal services, there is no proof that they constituted the fruits of the check kiting conspiracy. The bulk of the payments were made in 1962, 1963 and 1964, long before the check kiting scheme began. Further, payments in the same manner and amount were made to Dr. Campoli as a director of Life Aid and to Joseph McCrane as a director of Trans-Ignition (A. 557), neither of whom was charged with having received the fruits of a conspiracy. Finally, the jury found petitioner innocent under Counts XIX, XX, and XXI which were based on the mailing of weekly checks to petitioner as part of the scheme to defraud.

(c) *Bank Loans.* The prosecution relied on the fact that on two occasions the proceeds of loans to petitioner were used to aid Alper's enterprises. The first of these loans, in the amount of $2,000, was made in September, 1963, at Philadelphia National Bank. The second, in the amount of $5,000, was at People's Bank in June, 1964.

As to the first loan, it has already been shown that Hartsock, Alper, Joseph McCrane and petitioner agreed to put in $2,000 each in connection with the formation of Trans-Ignition. Hartsock arranged the loan at Cherry Hill's correspondent bank (A. 174) and the cashier's check was forwarded to him in payment of petitioner's share. Part of the money was used by Hartsock to cover Life Aid overdrafts but there is no evidence whatsoever that petitioner had any knowledge of this (A. 387). The corporation was duly formed, and an account in its name opened in the Stone Harbor Bank with an arrangement there to discount its trade acceptances.

The circumstances surrounding the use of the second loan account at People's where, by that time, Hartsock was executive vice president, are somewhat obscure. The note securing this loan was signed by petitioner (A. 400). The loan account was used for a year but the cashier's checks issued in petitioner's name under it, were not signed by petitioner and the proceeds were deposited either to Alper's account at People's or to the corporate account in Stone

Harbor. Petitioner testified that he knew nothing of the circumstances which were involved in this continued use of the loan account and there is no testimony to the contrary (A. 400-404).

Both loans were repaid (A. 404, 407). More to the point, it is difficult to see how these loans can constitute the basis for imputing to petitioner participation in the subsequent check kiting scheme. Lending needed money for Alper's enterprises was not illegal in any sense. Here, as on every other occasion, petitioner placed too much reliance on Alper's business ability and Hartsock's integrity.[5]

In connection with both of these loans, the prosecution cross-examined petitioner vigorously to show that financial statements filed by him in connection with these loans understated his liabilities. In both cases, the loans had been immediately approved and the financial statements hastily prepared thereafter for the bank's files (A. 368-370, 404-405). Moreover, testimony on behalf of petitioner showed that these financial statements also understated his assets and that, fully corrected, they would reflect a net worth greater than that shown on the statements (A. 372-387, 404-406, 599, 604).

(d) *Telephone conversations with bank officials in the spring of 1965.* In June and July, 1965, petitioner spoke on the telephone with officials at Industrial Valley and Central Penn, concerned with the status of Alper's corporate accounts (A. 259-260, 130-131). Petitioner assured the bank officials that no loss would be suffered on account of Alper's businesses. On receiving a second call

5. In connection with the motion for a new trial, an affidavit by Alper was filed (A. 96a-100a). In the affidavit, Alper stated that the only information petitioner had with respect to Alper's businesses consisted of periodic financial statements prepared by a certified public accountant, showing the businesses to be active and profitable. These financial statements (A. 25a-52a) were excluded from evidence on the ground that, since petitioner had testified that he had received them and they showed the businesses to be profitable, the statements themselves were cumulative (App. 27a).

from Central Penn, petitioner stated that he was mystified by the information he received and told the bank to treat Alper like any other customer (A. 152-153).[6]

The prosecution contended that petitioner knew that Alper had opened these various accounts, that the kite was in danger, and that these calls were designed to keep it from collapsing. The court below accepted this argument, stating, as one of the three principal grounds of affirmance, petitioner's "... efforts ... to reassure several bankers worried about overdrafts. ..." (App. 21a).

The facts are otherwise. Petitioner's first knowledge of the accounts, let alone the trouble the accounts were in, came to him when he received these calls from the banks in June and early July. At that point, he still believed, as did others who knew Alper, that Alper was an active and respected member of the business community.

In any event, the prosecution's interpretation of these telephone calls defies common sense. They took place at a time when petitioner was under intense examination by both the Governor of Pennsylvania and by the Judiciary Committee of the Philadelphia Bar Association in connection with his upcoming judicial appointment (A. 351-354, 357-358). He was, in fact, appointed to the bench in August, 1965, and had been under consideration since 1963. In these circumstances, it is inconceivable that these telephone conversations would be viewed as open and flagrant participation in a check kiting fraud. To the contrary, the conversations show petitioner's good faith belief in Alper and his ignorance of the fraudulent scheme.

(c) *Fund raising activities.* In affirming petitioner's conviction, the court below relied, *inter alia*, on the

6. An official of Fidelity-Philadelphia testified that, on July 2, 1965, he received a telephone call from a person who identified himself as petitioner and stated that a loan was being arranged to take care of difficulties with checks (A. 251). Petitioner testified he had never made such a call. The official testified that he had never met petitioner and the call could have been from someone else (A. 254).

fact that petitioner attempted to help Alper obtain investors and financing (App. 20a). The prosecution had made much of the fact that Dr. Campoli and Reiter were urged to invest in Life Aid, that petitioner had introduced Alper to an official of Industrial Valley Bank when Alper hoped to obtain a line of credit there and that petitioner, on occasion, sought to interest other clients in investing in Alper's enterprises (A. 486-490).

It is impossible to see any connection between such action and the check kiting scheme or, in fact, to find anything unusual about this activity by a lawyer on behalf of a client. To the contrary, it is fairly common practice for an attorney to assist business clients in this fashion and it is clear that, in examining the record upon which petitioner's conviction is based, this activity can in no sense be viewed as proving petitioner to be a conspirator.

(f) *Petitioner's association with Alper.* The court below rested decision, in large measure, upon petitioner's ". . . continued close association with Alper. . ." (App. 21a). In so holding the court accepted the contention made throughout this proceeding by the prosecution that petitioner, by reason of his relationship with Alper over a period of years, must have been privy to the check kiting scheme which Alper and Hartsock began in the fall of 1964.

There is tragic irony in the contrast between the weight accorded to the fact of association in this case and the treatment given to a similar contention in a case decided by a different panel of the court below only a few months earlier. In *United States v. DeCavalcante*, 440 F.2d 1264 (C.A. 3, 1971), the principal issue was whether the prosecution's evidence of conspiracy to extort was sufficient to take the case to the jury. The district court had held that the evidence was sufficient and DeCavalcante had been convicted. The conviction was reversed.

DeCavalcante's defense was that he had been called upon to mediate a dispute between a New York group of

extortionists and a Pennsylvania group of gamblers. The prosecution urged that DeCavalcante was part of the extortionist scheme since he had long been associated with the gangsters who were attempting the extortion. In reversing DeCavalcante's conviction, the court of appeals held that the evidence upon which the prosecution relied was fully consistent with DeCavalcante's defense that he was simply acting as a mediator. The fact of his association with members of the extortionist group, characterized by the court of appeals as amounting to no more than an argument by the prosecution, was held insufficient to tie him into the conspiracy.

Here, a different standard has been applied and the fact of petitioner's association with Alper, again no more than a prosecution argument that petitioner *must* have known of the check-kiting scheme, has been treated as strong evidence of petitioner's guilt. The correct ruling with respect to "association" as evidence of guilt of conspiracy was made in the DeCavalcante case involving a notorious underworld figure. The wrong ruling was made in this case involving a highly respected lawyer and judge.[7]

7. Petitioner's character witnesses included former Mayor of Philadelphia Richardson Dilworth, United States District Court Judge Joseph S. Lord, Bernard G. Segal (who up to the filing of this petition had no connection with this litigation); Pennsylvania Common Pleas Court Judge Raymond Pace Alexander, Philadelphia District Attorney Arlen Specter and Philadelphia Police Commissioner, now Mayor-elect, Frank Rizzo. Hundreds more citizens sought to give testimony as to petitioner's exemplary reputation. As already noted, petitioner was under active consideration for judicial appointment in 1963 and was appointed a judge of the Common Pleas Court of Philadelphia County in 1965. On both occasions, he was closely investigated by representatives of the Governor and by the Judiciary Committee of the Philadelphia Bar Association. On both occasions, he was approved for judicial appointment. By reason of the present proceeding, petitioner was suspended from exercising his judicial functions, until the final outcome of the case, by an order of the Supreme Court of Pennsylvania which ". . . was entered with reluctance . . . ." *In Re Stanley M. Greenberg, Judge, Court of Common Pleas of Philadelphia*, 442 Pa. 411 (1971).

If "association" can ever be entitled to weight as evidence in a conspiracy case, it cannot be accorded weight in a case involving a lawyer-client relationship. The association, in such a case, is automatic and, if the client is guilty, the ". . . uneasy seat. . ." becomes, for the accused lawyer, an impossible position. In short, when a lawyer is accused of conspiracy with his client, "association" may not be taken as proof that the lawyer intended to participate in the client's wrongdoing.

In giving weight to the "association" between petitioner and his client, Alper, the court below also went into conflict with decisions of the Court of Appeals for the Ninth Circuit and the Court of Appeals for the Fifth Circuit. *Windsor v. United States*, 384 F.2d 535 (C.A. 9, 1967) and *United States v. Musgrave*, 444 F.2d 755 (C.A. 5, 1971) both involve situations in which lawyers were convicted of conspiracy along with their clients and, in each case, the appellate court reversed. The cases against the lawyer-defendants had been permitted to go to the jury on the basis of their involvement in the affairs of clients who were engaged in illegal activities, in *Windsor*, a land swindle and in *Musgrave*, the fraudulent procurement of a loan. In neither case was there evidence that the lawyer knew or participated in the actual illegal acts involved. In *Windsor*, the court said that there was ". . . nothing but speculation to connect appellant with these on-the-scene representations. . . ." 384 F.2d at 536. In *Musgrave*, the court said that it was ". . . unimpressed with the argument that Bryant's close relationship with Musgrave as attorney and client may establish guilt or knowledge. . ." 444 F.2d at 760. In both cases, the court held that the lawyers' motions for judgment of acquittal should have been granted.

This is a case in which the charge against petitioner is ". . . so totally devoid of evidentiary support. . ." as

to render his conviction unconstitutional under the due process clause. *Thompson v. Louisville*, 362 U.S. at 199. There is no proof that petitioner participated in, or even knew of, the check kiting conspiracy between Alper and Hartsock. For this reason, this Court should grant review and set aside a conviction which amounts to a tragic miscarriage of justice, destroying a respected lawyer and able jurist. Cf. Stern & Gressman, *Supreme Court Practice* (4th Ed. 1969); pp. 178-179, *Montana v. Kennedy*, 366 U.S. 308, 309 (1961).

2. *Petitioner's Sixth Amendment Right to A Unanimous Jury Verdict Was Violated.* On the afternoon of April 28, 1970, after having been properly instructed as to burden of proof, the need for unanimity, and the need to consider each other's views, the jury began its deliberation (A. 611). The jury recessed at 10:00 p.m., and reconvened at 9:00 a.m. on the following morning. At 10:35 a.m., the jury reported its verdict as to Alper and Feiner but stated that it was "hopelessly deadlocked" as to petitioner. The judge accepted the verdict as to Alper and Feiner but sent the jury out to deliberate further as to petitioner. At 1:10 p.m., the judge sent a note to the jury, again instructing them to continue deliberating. At 2:45 p.m., the judge again called the jury back and gave it a supplementary instruction which added nothing to the original charge and amounted to no more than a further instruction to keep deliberating. No time limit was set as to this further deliberation. At 3:55 p.m., the jury brought in its verdict as to petitioner, with the verdict slip showing that petitioner had been marked not guilty on all counts with a change on this slip to guilty on Count I only (App. 4a).

Petitioner contends that, in these circumstances, he has been deprived of his constitutional right to a unanimous verdict. The court below rejected this contention primarily on the basis of considerations of judicial administration, a comparison between the length of the trial and the length

of time the jury had deliberated (App. 35a).* The court also noted that the trial judge had no way of knowing which way further deliberation would go (App. 35a).

Neither of these grounds is supportable. Consideration of judicial administration cannot serve to justify any interference with the independent deliberations of the jury. Recent decisions dealing with the so-called "Allen Charge" make the point. See *United States v. Fioravanti*, 412 F.2d 407, 414-420 (C.A. 3, 1969) and cases and authorities cited therein. Nor is speculation as to the outcome a valid consideration. It is the fact of interference—not the final result—which is critical in determining whether a jury has been coerced or has reached a compromise verdict.

When the jury first came in, there was no more reason to doubt the accuracy of its report that it was "hopelessly deadlocked" as to petitioner than there was to doubt or reject its verdicts as to Alper and Feiner. The constitutional requirement of unanimity in our unique jury system presupposes inability to reach a verdict. *United States v. Fioravanti*, *supra*, at pp. 416, 417-418. Accepting verdicts as to Alper and Feiner and sending the jury out to continue deliberating as to petitioner was in itself a form of pressure. The pressure was continued by the note sent by the judge directing the jury to continue deliberating. The pressure was further continued by a supplemental charge which said nothing new.

8. This Court has not considered 7 hours deliberation by a jury to be a short time. In *Bollenbach v. United States*, 326 U.S. 607 (1946), the jury deliberated for 7 hours and reported itself "hopelessly deadlocked." The trial judge then gave the jury a supplemental charge. This Court noted (at 612):

> "An experienced trial judge should have realized that such a long wrangle in the jury room as occurred in this case would leave the jury in a state of frayed nerves and fatigued attention, with the desire to go home and escape overnight detention, particularly in view of the plain hint from the judge that a verdict ought to be forthcoming."

The verdict which was returned shortly thereafter was obviously coerced. The altered verdict slip itself almost makes the point (App. 11a). There is no way of knowing when, or in what circumstances, the verdict slip was marked. No time limit had been set for deliberation and the whole impact of the course followed by the trial judge, including continued instructions to continue deliberating, was that the jury must reach a verdict.[9]

It is therefore submitted that there was interference by the trial judge with the deliberative process of the jury in connection with petitioner's conviction, and that petitioner was denied his constitutional right to a unanimous verdict. Further, the circumstances surrounding the relationship between the trial judge and the jury in this case warrant the exercise of this Court's supervisory powers over the administration of criminal justice. *McNabb v. United States*, 318 U.S. 332, 340-341 (1943). There is, as this Court knows, growing concern with, and condemnation of, the so-called "Allen Charge." Cf. *United States v. Fioratanti*, *supra*, at pp. 111-119, and cases and authorities there cited. The course of events between trial judge and jury in this case, during the jury's deliberations, contain the same elements of coercion as those found offensive in the use of the "Allen Charge."

3. The Inconsistency of the Verdict in This Case Deprived Petitioner of His Constitutional Rights Under the Fifth and Sixth Amendments. Petitioner was acquitted under Counts II through XXI, all of the counts charging the substantive offenses of use of the mails to defraud. Each substantive count realleged the elements of the identical scheme outlined in the conspiracy count, and concluded with the specific allegation of the mailing of a particular matter, alleged to be in furtherance of that scheme.

From the conviction of Alper under Counts II through XXI, it must be concluded that the jury found

---

9. And see point 3, *infra*, as to the inconsistency of the verdict thus reached.

that the check kiting scheme existed, and that mailings in furtherance of that scheme took place.[10] Petitioner was acquitted of the same substantive crimes. It is clear from the trial court's instructions that petitioner could have been found guilty of the substantive counts under the aiding and abetting statute if he "consciously associated himself with the criminal venture with the intent that his conduct and its success" (N.T. 4131). The trial judge also instructed that petitioner could be held responsible for the operation of the scheme if he was shown to have intentionally acted in some way to further its operation with knowledge that it included the making of "misrepresentations." (N.T. 4186). The trial judge specifically instructed

> It is not sufficient if the prosecution's evidence shows only that Stanley M. Greenberg engaged in conduct which could have been in furtherance of a scheme to defraud banks, if he had known of the scheme. The evidence must show affirmatively that he did know of the scheme, and with such knowledge actually participated in the scheme and if it does not so show, it is your duty to find him not guilty." (N.T. 4189).

By acquitting petitioner of the substantive counts under these instructions, the jury must have found that he did not act intentionally in some way to further the operation of the scheme with knowledge that the scheme was one to defraud, that petitioner did not know of the

10. The conviction of Alper on Count I, the conspiracy count establishes that Alper was found to have conspired with someone to violate the mail fraud statute. At the time this verdict was returned, the jury found Feiner innocent and was "hopelessly deadlocked" as to petitioner. From these facts and in view of the large volume of evidence against co-conspirator Hartsock, it can be assumed that Hartsock was the other person in the conspiracy with Alper.

scheme to defraud, and did not associate himself with the scheme and in some way further its operation.

Under the trial court's instructions, the jury was required, in order to hold petitioner guilty under Count I, to find beyond a reasonable doubt that petitioner, and at least one other person, conspired to violate the mail fraud statute. The prosecution was required to prove that petitioner personally knew that the purpose of the conspiracy which he had joined was to defraud, and by means of fraud, to obtain money from the named banks. Yet the jury's acquittal of petitioner on Counts II through XXI constituted a finding by the jury that petitioner did not know of the scheme to defraud. It is obvious that if petitioner did not know of the scheme to defraud, he could not have knowingly conspired to carry out that scheme.

Thus, the acquittal of petitioner under Counts II through XXI is necessarily inconsistent with the verdict of guilty under Count I.[11] And there is no factual basis for this inconsistency. It is clear from the trial judge's instructions on aiding and abetting, and the relevant case law, that petitioner's acquittal was not based on a finding that he did not place specific matters into the mail. The mailing element of the offense charged in Counts II through XXI is satisfied if use of the mails is incident to a material element of the scheme, and one acts with knowledge that use of the mails will follow in the ordinary course of business or that such use could reasonably be foreseen. *Bannister v. United States*, 379 F.2d 750 (C.A. 9, 1967), *cert. denied*, 390 U.S. 927 (1968); *Kann v.*

[11] This is not a case where the conspiracy is found to exist, but the substantive crime which was the subject matter of the conspiracy was never perpetrated. On the contrary, the jury found Alper guilty of all the substantive counts, and thus found that the subject matter of the conspiracy was carried out. Thus, the acquittal of petitioner on Counts II - XXI necessarily went to his *knowledge* of the scheme, since some of his actions might be viewed as aiding the scheme *if* he had known of its existence.

United States, 323 U.S. 88 (1944). Rather, it is clear that the jury verdict here resulted from confusion and compromise. The jury was faced with twenty-one counts, voluminous evidence, all of which was confusing and technical, and the relevance of which was difficult to determine, and the cumulation of such evidence produced in almost nine weeks of trial. The jury may well have felt psychological pressure to convict on at least one count in such a situation. *Ashe v. Swenson: Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts*, 71 Col. L. Rev. 221, 231 n.60 (1970). That the jury was confused is further supported by the fact that, although it convicted Alper of all twenty-one counts, it reported that it was hopelessly deadlocked as to petitioner. Necessarily, at least some of the jurors must have found petitioner innocent on all counts. Furthermore, as discussed above, the jury only reached a verdict after a supplemental charge urging them to do so was given. When the jury finally reached a result, the verdict form showed that the jury had originally determined that petitioner was not guilty of Count 1, but then subsequently changed the verdict to guilty. When the trial judge read the jury's verdict, he commented:

> THE COURT: I might say for the record the Court is very concerned with this verdict. I now show it to all counsel. I don't know what it means, very frankly, as to Count 1." (A. 660).

The inconsistent verdict in this case, resulting from either confusion, coercion or compromise, denies petitioner due process under the Fifth Amendment and deprives him of his right to unanimity under the Sixth Amendment. It is recognized that this Court's decision in *Dunn v. United States*, 284 U.S. 390 (1932) has often been cited for the broad proposition that consistency in jury verdicts is not required. Our analysis, it is clear that the blanket sweep of

this principle has been refined and varied by subsequent decisions and authority, and does not control in this case.[12]

The Court's first premise in *Dunn* no longer reflects the law. In *Sealfon v. United States*, 332 U.S. 575 (1948), this Court decided that, where separate trials are held for crimes based on the same facts, *res judicata* applies. In *Sealfon*, the defendant, at the first trial, was found not guilty of conspiracy. At the second trial, on the substantive offense, the verdict was guilty. This Court found the result to be inconsistent, and held the result in the first trial to be *res judicata* in the second, stating (332 U.S. at 580):

> ". . . It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do."

And, in the recent case of *Ashe v. Swenson*, 397 U.S. 436, 443 (1970), this Court noted that ". . . collateral estoppel has been an established rule of federal criminal law . . ." Thus, the first justification for the decision in *Dunn* is no longer valid since, had the counts been separately tried and an acquittal won, it could now be pleaded as *res judicata* in the other.

There can be no rational justification for placing a greater hardship on the defendant who is tried on all counts at once than on one who is subject to separate trials. Nor can such inconsistency be justified by the second *Dunn* premise, the refusal to speculate as to the jury verdict, the need to preserve jury discretion. It is the defendant who is supposed to be protected by jury discretion. In any event, this Court, in *Sealfon*, has stated that, in order to determine whether *res judicata* applies, the court must examine the

12. See the concurring opinion of Chief Judge Bazelon in *United States v. Fox*, 433 F.2d 1235, 1239 (D.C. Cir. 1970); *Inconsistent Verdicts in a Federal Criminal Trial*, 60 Col. L. Rev. 999, 1008 (1960).

facts at each trial, and the instructions under which the jury arrived at its verdict in the first trial. 332 U.S. at 579. In *Ashe*, this Court stated that the jury verdict must be examined with ". . . realism and rationality . . ." 397 U.S. at 444.

It is clear that the jury verdict in this case, when examined with ". . . realism and rationality. . ." was one which resulted from compromise and confusion. Under the instructions given, the jury found that petitioner did not know of the kiting scheme. Given this verdict on all the substantive counts, the jury could only have found petitioner guilty on the conspiracy charge as a compromise. Whether this result was caused by coercion or confusion makes no difference. In either event, the conviction deprives petitioner of due process of law and his right to a unanimous verdict.

4. *Petitioner's Sixth Amendment Rights and His Right Under Rule 43 of the Federal Rules of Criminal Procedure Were Violated by Instructions Given to the Jury While He Was Not Present.* On two occasions, the prosecution and defense counsel met with the trial judge in chambers to consider and respond to inquiries from the jury (A. 612-623). Petitioner was not present at, nor was he notified of, these proceedings.

Petitioner contends that, by reason of these proceedings which took place in his absence, his constitutional and statutory right to be present at all times in the proceeding against him was violated. The court below rejected this contention on the ground that the trial judge was entitled to rely on the agency duties of counsel and to assume that petitioner's absence was voluntary, and in any event, that any error was harmless (App. 31a-33a).

The ruling of the court below is in error. At least one circuit has clearly held that it is error for the trial judge to instruct the jury in the absence of the defendant even though his counsel was present, and agreed to the procedure used. *Evans v. United States*, 284 F.2d 393, 394 (C.A. 6, 1960). In *Evans*, the court questioned whether a

defendant's constitutional right to be present could ever be waived, and held that in that case it was clear that no waiver could be found. The Court held that waiver must be of a *known* right, and the defendant in *Evans*, like this petitioner, was not notified of the instructions to the jury until after they took place. In the instant case, petitioner was not advised of the conference in chambers or its purpose and indeed he could not have been since counsel, when called into chambers, had no knowledge of the judge's purpose. Therefore, there was no knowing waiver, and petitioner could not be found to have been voluntarily absent. For the court below to have "assumed" that counsel had implied authority to receive notice for the petitioner, and to have assumed that petitioner's absence was voluntary (App. 32a) is erroneous. Courts must ". . . indulge every reasonable presumption against waiver of fundamental constitutional rights. . . ." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

Although there is a conflict among the circuits as to whether or not the right of defendant to be present is absolute, and cannot be waived by counsel, the ruling of the court below is inconsistent with the rules of those circuits which permit waiver by a defendant or his counsel.[13] For example, in *United States v. Crutcher*, 405 F.2d 239 (C.A. 2, 1968), cited by the court below (App. 32a), the court held that, even assuming counsel in that case had the authority to act for the defendant, he would not have the ability to bind the defendant unless he had consulted with him and obtained his consent. Absent such consultation and consent, there could be no waiver. In the instant case, there is no evidence that counsel for petitioner consulted

13. *Evans*, *supra*, and *United States v. Neal*, 320 F.2d 533 (C.A. 3, 1963), were cited by the courts in *United States v. Schor*, 418 F.2d 26 (C.A. 2, 1969), and *Ware v. United States*, 376 F.2d 717 (C.A. 7, 1967), as holding that violation of the right of the defendant to be present was *per se* unconstitutional. The courts in *Schor* and *Ware* rejected the *per se* rule, but applied the harmless error rule.

with him and obtained his consent. Thus, there can be no waiver.

There is possible conflict within the Third Circuit as to whether or not a defendant has the absolute right to be present when an inquiry is received from the jury, and when it is answered by the trial judge. In *United States v. Neal*, 320 F.2d 533 (C.A. 3, 1963), the court seemed to hold that this right was absolute, and that defendant's absence constituted a *per se* violation of his constitutional rights, necessitating reversal. The court below distinguished *Neal* on the ground that the supplemental instruction there was highly prejudicial (App. 32a). However, the court in *Neal* specifically stated that it was "... not necessary to our disposition, in view of the settled law ... to consider whether the error was harmless. 320 F.2d at 536. The *Neal* court noted the lack of merit to the government's contention that the error was harmless. The court below relied instead on *United States v. Grosso*, 358 F.2d 154 (C.A. 3, 1963), reversed on other grounds, 390 U.S. 62 (1968), a case of dubious authority in light of the reversal in its entirety by this Court. 390 U.S. at 72. In light of another serious constitutional error in *Grosso*, this Court specifically stated that it was unnecessary to reach petitioner's alternative argument concerning the conduct of the trial judge after submission of the case to the jury. 390 U.S. at 72, n.10.

The court below found that, regardless of waiver by petitioner, any error was harmless. This finding of the court is also erroneous. Unlike the courts in *Schor* and *Ware, supra*, the court below has misapplied the harmless error rule established in *Chapman v. California*, 386 U.S. 18 (1967). This Court in *Chapman* clearly placed on the party not claiming to be prejudiced the burden of showing beyond a reasonable doubt that the error was harmless. Although the court below stated that the error was harmless beyond a reasonable doubt, it is clear that the court erroneously placed the burden on the defense, rather than the prosecution. The court below noted that there was no

evidence that petitioner had been "excluded" from the discussions or was even present in the court house (App. 29a, 31a). However, it is also true that the prosecution produced no evidence to the contrary. Likewise, the court below stated that neither communication to the jury was claimed to be erroneous, again placing the burden on the wrong party (App. 33a).[14] The court likewise stated that petitioner was unable to say "what or how" prejudice might have been prevented had he been present during the inquiry concerning exhibits. In short, the court below erroneously required the petitioner to establish how the error was prejudicial, rather than requiring the government to establish beyond a reasonable doubt that the error was *not* prejudicial.

In fact, in the circumstances of this case, the prosecution could not possibly meet its burden of showing beyond a reasonable doubt that the absence of petitioner was not prejudicial. Petitioner is an experienced and distinguished trial judge. Had he been present and had the opportunity to consult with his counsel, he may well have suggested alternatives to the procedure used. It is precisely this kind of intellectual interaction between the defendant and his counsel which the right to be present and consult with counsel is designed to protect. In addition, we have here a situation in which the excluded defendant was, by experience and education, peculiarly well equipped to assist in his own defense.

Petitioner was deprived of his constitutional right to be present when the trial court communicated with the jury during its deliberations. The court below should be reversed on this ground. Further, the situation also warrants the exercise by this Court of its supervisory powers. See, *supra*, p. 26.

---

14. The court stated that the jury's verdict demonstrated that the instruction as to the verdict was understood (App. 33a). In fact, however, as discussed above, the jury's verdict in regard to petitioner was inconsistent and so confusing that even the trial judge did not know what it meant. See *supra*, p. 27.

CONCLUSION

For the reasons set forth above, this petition should be granted.

Respectfully submitted,

BERNARD G. SEGAL
WILLIAM T. COLEMAN, JR.
JOHN R. MCCONNELL

SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pa. 19102

DILWORTH, PAXSON, KALISH, LEVY & COLEMAN
2600 The Fidelity Building
Philadelphia, Pa. 19109

MORGAN, LEWIS & BOCKIUS
2107 The Fidelity Building
Philadelphia, Pa. 19109

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D. C. Criminal No. 23208)

UNITED STATES OF AMERICA

v.

FRANK ALPER, STANLEY M. GREENBERG,
MORTON FEINER, *Defendants*

On Motion for Judgment of Acquittal or in the alternative, for a New Trial

OPINION AND ORDER

WHIPPLE, *District Judge.*

Defendant Stanley M. Greenberg, having been convicted by a jury of the crime of conspiracy, in violation of 18 U.S.C. §371, here moves, pursuant to Rule 29(c) Fed. R. Crim. P., for a judgment of acquittal or, alternatively, for a new trial pursuant to the provisions of Rule 33, Fed. R. Crim. P.

First to be determined is the standard by which a motion for a judgment of acquittal should be considered. The government argues that the "substantial evidence" test, long accepted in the Second Circuit,[1] should be applied here. Under this test if there is substantial evidence to support the guilty verdict, viewing the evidence in the light most favorable to the government and disregarding all evidence inconsistent with guilt, the motion for a judgment of acquittal should be denied. The government relies primarily on the Supreme Court decision in *Glasser v. United States*, 315 U.S. 60 (1942) and the case of *United States v. Wapnick*, 202 F. Supp. 712, at 713 (E.D. N.Y. 1962) which, the government suggests, pointed to the fact that the Third Circuit had declined to apply the "Curley" test, here proposed by the defense.

This latter test, announced by Judge Prettyman in *Curley v. United States*, 160 F.2d 229, 232-33 (D. C. Cir.), cert. den. 331 U.S. 837, reh. den. 331 U.S. 869 (1947), provides as follows:

> "If the evidence is such that reasonable jurymen must necessarily have such doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make. * * *. The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full pay

1. This "substantial evidence" or "Second Circuit" test, as it has been called, was enunciated by Judge Learned Hand, speaking for the Court of Appeals in *United States v. Feinberg*, 140 F.2d 592, 594 (2nd Cir.), cert. denied 322 U.S. 726 (1944).

to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter."

The court in *Wapnick*, supra, relied on the District Court case of *United States v. Ludwig*, 177 F. Supp. 365, 367 (E.D. Pa. 1959) for its observation that the Third Circuit had not adopted the beyond-a-reasonable-doubt yardstick of *Curley*. In doing this it was justified, for in *Ludwig* the District Court in passing on a motion for a judgment of acquittal wrote: "Taking the view most favorable to the government, the verdict of a jury must be sustained if there is substantial evidence to support it." *Ludwig*, supra, at 367. The Court in *Ludwig*, however, cited no source to support this view.

More recently, in *United States v. Morris*, 308 F. Supp. 1348 (E.D. Pa. 1970), Judge Masterson of that same district declined, albeit without discussion, to follow *Ludwig*. In *Morris* he wrote:

"The standard by which the Court is to be guided in passing on a motion for judgment of acquittal is whether, taking the view most favorable to the Government, *United States v. Giuliano*, 263 F.2d 582, 584 (3d Cir. 1959), the evidence is 'insufficient to sustain a conviction.' Rule 29(a), Federal Rules of Criminal Procedure.

"The question is whether all the pieces of evidence against the defendant, taken together, make a strong enough case to let a jury find him guilty beyond a reasonable doubt." *United States v. Alfisi*, 240 F. 2d 840, 841 (4th Cir.) cert. den. *Fishman v. United States*, 353 U.S. 939 (1957)."

Morris, supra, at 1351. This accords with the *Curley* view that a reviewing judge must find that a juror—acting as a reasonable man—might or could fairly conclude guilt beyond a reasonable doubt. I think that *Glasser v. United States*, supra, upon which, as noted above, the government relies, is inapposite, and, insofar as *Hildwin* provides a less demanding test than *Morris* for the determination of a motion for judgment of acquittal, I decline to follow it.

My conclusion is buttressed by the fact that the "Second Circuit" or "substantial evidence" test appears to have lost its vitality, in that circuit as well as in other circuits. See, e.g., *United States v. Melillo*, 275 F. Supp. 314 (E.D. N.Y. 1967) (Weinstein, J.) (rejecting Second Circuit Rule after extensive review of caselaw and authorities). See also, *United States v. Leach*, 427 F. 2d 1107, 1111 (1st Cir. 1970); *United States v. Andrews*, 427 F. 2d 539 (5th Cir. 1970); *United States v. Cotton*, 426 F. 2d 939, 942 (6th Cir. 1970); *Bailey v. United States*, 416 F. 2d 1110, 1112 (D.C. Cir. 1969). No recent case has been cited to the court, nor any found by the court, approving the discredited Second Circuit Rule. Again, I decline to apply it to the facts of this case.

While to deny the defendant's motion for acquittal I must find that a juror as a reasonable man could find every element of the crime of conspiracy proven beyond a reasonable doubt, in this posture of the case all reasonable inferences are to be

resolved in favor of the prosecution and the evidence should be viewed in the light most favorable to the government with respect to each element of the offense: *Morris*, supra, at 1351.

This was a case based on circumstantial evidence. In reviewing such evidence it must be determined whether reasonable minds could conclude, as the jury here did, that this evidence is inconsistent with the hypothesis of the accused's innocence. *United States v. Andrews*, 427 F.2d 539, 540 (5th Cir. 1970); 2 Wright, *Federal Practice and Procedure* §467 at 258-59 (1969).

With all the above in mind and after reviewing carefully the arguments of counsel and the transcript of the trial I maintain my belief that a reasonable man could find that Greenberg, in concert with others, acted in violation of Section 371 of Title 18. I so ruled at the close of the prosecution's case and again at the close of all of the evidence, and, while I am hopefully looking objectively and anew at the arguments of counsel as presented here, my conclusion persists. To repeat at length the evidentiary basis for my decision would be of little value. Suffice it to say that my conviction that a jury could rationally conclude Greenberg's guilt beyond a reasonable doubt remains. The circumstantial link between the abundant evidence of the illegal action of conspiring to defraud banks[2] and the evidence of the knowledge, intent and participation of Greenberg was sufficiently strong for a jury to be required

2. Greenberg concedes that "the evidence adduced at trial undoubtedly was sufficient to support the conclusion that a check kiting scheme among the corporate accounts and Alper's personal accounts at the various banks actually existed." Greenberg Brief in Support of Judgment of Acquittal, p. 2. This, of course, is not tantamount to a concession that a *conspiracy* to defraud banks was proven. In effect Greenberg has conceded only that a *prima facie* case of attempted fraud was proven as to Alper

to decide his guilt or innocence. The motion for a judgment of acquittal is denied.

Greenberg moves alternatively for a new trial.

Rule 33 of the Federal Rules of Criminal Procedure provides in part that "the court on motion of a defendant may grant a new trial to him if required in the interest of justice." A trial court should grant such a motion if it concludes that there is a reasonable probability that there has been a miscarriage of justice.

Greenberg urges a number of grounds for the granting of a new trial here. First among these is the argument that the court made certain errors in its rulings on evidentiary matters during the trial, which errors resulted in an injustice. Counsel cites specifically the admission into testimony of the contents of a telephone conversation alleged to be between a bank official named Alfred Brammer and Greenberg, the admission into evidence as against Greenberg of certain corporate business records and the court's refusal to admit into evidence certain accounting reports offered on behalf of Greenberg.

It remains my belief that the rulings on these matters were well founded in law; moreover, even if this should not be so, the error would be harmless and would not result in a miscarriage of justice requiring a new trial.

Greenberg next argues that the verdict was against the weight of the evidence. Such a motion should be granted only in the exceptional case where the evidence preponderates heavily against the verdict. *United States v. Pepe*, 209 F. Supp. 592, 595 (D. Del. 1962), aff'd 339 F.2d 264 (3rd Cir. 1964). As Professor Wright has written:

> "It has been said that on such a motion [for a new trial on grounds that the verdict is against the weight of the evidence] the Court sits as a thirteenth juror. The mo-

tion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial on this ground should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict." [Footnotes omitted].

2 Wright, *Federal Practice and Procedure*, §553, p. 487 (1969).

While, as noted above, on a motion for a judgment of acquittal the court is required to assume the truth of the evidence adduced in support of the indictment, on a motion for a new trial urged on the ground that the verdict is against the weight of the evidence the court may weigh the evidence and consider the credibility of witnesses. *United States v. Robinson*, 71 F. Supp. 9, 10 (D. D.C. 1947) (Holtzoff, J.).

Having reviewed and weighed the testimony of the witnesses presented by both the prosecution and the defense at trial and having assessed the credibility of these witnesses, (while realizing that the credibility of relatively few witnesses was challenged or subject to challenge during this long and rather intricate trial) I am of the opinion that the verdict is in harmony with the evidence and that the case is one in which the jury's determination should not be disturbed by the court.

Greenberg also argues that the court's supplemental instructions given to the jury after it had reported itself as "hopelessly deadlocked" necessitates the grant of a new trial.

This case extended over more than forty trial days and the jury deliberated perhaps six hours before reporting itself deadlocked. I do not believe that either the act of giving the supplemental instructions or the actual wording of the instructions prejudiced the defendant Greenberg in any way.

Greenberg argues finally that the "unavailability of the testimony"[3] of his co-defendants Alper and Feiner at the trial, and their demonstrated willingness now to testify in his behalf necessitates a new trial.

Feiner has submitted an affidavit to the court in which he states that upon a retrial of Greenberg, "the responses he would give to questions would be the same as his testimony before the Grand Jury . . . . . " Alper has submitted an affidavit which states that on a retrial of Greenberg he would testify that Greenberg had no knowledge of the day-to-day financial operations of the Alper corporations and that, insofar as Alper knows, the testimony given by Greenberg at the trial was accurate and truthful. Alper also incorporates in his affidavit statements he made to this court in a letter received by the court subsequent to his and Greenberg's conviction. In that letter Alper, while not confessing his guilt, suggests that the trouble is all his fault and that Greenberg "never did anything but represent me legally and couldn't know anything of my financial difficulties."[4]

The facts in the case relevant to this argument might bear review. The experienced and highly competent counsel for Greenberg, shortly after the return of the Indictment, made a motion for Greenberg's trial to be severed from the trial of his co-defendants, but subsequently abandoned the motion prior to its argument. No other motion for severance was ever made by any party. Prior to trial and to some extent even

3. Greenberg Brief in Support of Motion for Acquittal or New Trial, p. 28; Greenberg Brief Responding to Govt. Brief in Opposition, p. 10.

4. Alper's letter to the Court is attached to his Affidavit as "Exhibit A." The affidavits of both Feiner and Alper, as well as Alper's letter, and the Grand Jury testimony of Feiner are included in a "Supplement to Motion of Defendant Stanley M. Greenberg for a New Trial." This "Supplement" is filed herewith for perusal on any appeal which might be taken on the rulings herein.

during the trial counsel for Alper and the attorneys representing the government engaged in plea negotiations. The court was aware of the negotiations but took no active part in them. Alper apparently was willing to plead guilty to some of the substantive counts of mail fraud (18 U.S.C. §1341) contained in the indictment, but was unwilling to plead guilty to the first count — that being one of conspiracy (18 U.S.C. §371)[5] — in which he was charged with Greenberg and Feiner.[6] The government, again apparently, was willing to accept Alper's guilty plea to certain substantive counts but was unwilling to dismiss the conspiracy count as to him. Alper continued in his plea of not guilty on all counts and was convicted both of conspiracy and all of the substantive counts of mail fraud at trial. Greenberg, of course, was convicted of conspiracy; Feiner was acquitted.

In support of his argument Greenberg relies on the cases of *Newsom v. United States*, 311 F.2d 74 (5th Cir.

[5] It should be noted that the case history contained herein is in no way intended to prejudice Alper's rights. It should be carefully noted that he has not made an admission of guilt. In fact, in the letter to the court noted above, incorporated into his affidavit, he makes the statement "I never intended to defraud anybody."

[6] G. Hartsock, the banker, had died before the return of the indictment and was accordingly named as a co-conspirator but not as a co-defendant. Counsel for Greenberg asserts in his Brief in Support of the Motion (p. 2) that Alper's testimony was not available to Greenberg at the trial because the prosecution, while willing to accept an Alper plea of guilty to conspiracy with Greenberg, refused to accept an Alper plea of guilty to conspiring with Hartsock. This, counsel argues, ensured Alper's continued plea of not guilty and his muteness at trial.

The prosecution, of course, cannot preclude a defendant from pleading guilty. Had Alper offered a guilty plea to the court, and the court was convinced the plea was made voluntarily with understanding of the nature of the charge and the consequences of the plea, and Alper had recited facts confirming a violation with Hartsock of 18 U.S.C. §371, the court would have accepted the plea. Rule 11, Fed. R. Crim. P.

1962), *Ledet v. United States*, 297 F.2d 737 (5th Cir. 1962) and *Amos v. United States*, 218 F.2d 44 (D.C. Cir. 1954); I find *Amos* inapposite because it involves the testimony of a disinterested material witness who through no fault of the defendant was physically unavailable to testify at the trial. Such is not the case here.

In *Ledet* the motion for a new trial was based on the theory of newly discovered evidence. Ledet and a co-defendant Bourg were tried together on a charge of possession of narcotics. The evidence against Bourg was strong; the evidence against Ledet was extremely weak. Bourg did not testify; Ledet did and asserted his innocence. Both, however, were convicted. The Court of Appeals found that the only testimony distinguishing the evidence against Ledet from the evidence offered against one Guevara in *Guevara v. United States*, 242 F.2d 745 (5th Cir. 1957) in which case that Court reversed a conviction and held that it was impossible for the jury to do more than speculate as to whether Guevara had possession, was the hearsay testimony of an agent concerning a statement made by Bourg to Ledet in the agent's presence. The *Ledet* court then noted that this hearsay testimony should have been objected to, and that, had this been done, it would have been inadmissible. This, of course, would have left the evidence against Ledet only as strong as the evidence against Guevara, and the case subject to dismissal.

After this trial, Bourg came forth, in support of Ledet's motion for a new trial, with an affidavit completely exculpating Ledet. The Court took note of the dangers inherent in this type of recantation:

> "We must also bear in mind that it is not unusual for one of two convicted accomplices to seek to assume the en-

ture fault and thus exculpate his co-defendant by the filing of a recanting affidavit. It goes without saying that not every such recanting affidavit requires a new trial of the other defendant for whose benefit it is produced."

It nevertheless granted Ledet's motion because of the "peculiar circumstances" of this case. Id.

The "peculiar circumstances" referred to by the *Ledet* Court included not only the exculpating affidavit submitted by Bourg but also the extreme tenuousness of the purely circumstantial evidence that had been offered against Ledet. Indeed, if the proper objection had been made to the hearsay evidence offered against Ledet at trial, the Circuit would have reversed his conviction solely on the basis of the earlier *Guevara* decision and would have found it unnecessary to even reach the newly-discovered evidence argument.

In *Newsome v. United States*, supra, Newsom and one Linton were charged together with the sale of marijuana to a narcotics agent. At the start of their joint trial, during voir dire, one of the prospective jurors stated in the presence of the entire panel that he knew Linton because he had "handled him" while he (the juror) was with the police department. Both defendants made motions for a mistrial, but only Linton's was granted. Newsom was tried and convicted by members of the panel which had heard the policeman's statement about his codefendant. Newsom testified in his own behalf. Linton was sworn in at the beginning of the trial at the request of both the defense and the prosecution, but he never testified, the given reason being that he could not testify without incriminating himself. Shortly after Newsom was convicted Linton entered a plea of guilty, at which time he exculpated Newsom. Subsequently an exculpating affidavit by Linton was attached to Newsom's motion for a new trial.

The Court of Appeals noted that the proof of guilty knowledge on the part of Newsom was extremely weak. It noted further that Newsom's trial before the panel which had heard the policeman's statement "may not have been entirely fair." Newsom could not (because Linton exercised his Fifth Amendment rights) and perhaps should not have wanted to (the policeman perhaps having an adverse opinion of Linton's credibility from incidents extraneous to this trial) avail himself of Linton's testimony in his behalf. The Court, again in this case, held that under the "peculiar circumstances" of this case the motion for a new trial should have been granted.

Ledet and *Newsom* both teach that something more than an exculpating affidavit is necessary before a new trial should be granted. Both had "peculiar circumstances" — *Ledet* the objectionable hearsay testimony and *Newsom* the juror's statement — which made the grant of a new trial appealing in the interest of justice. More than anything they demonstrated forcefully that every motion of this sort should stand or fall on the facts of the particular case.

Reviewing the facts of this case in the light of the proffered affidavits, I do not find those peculiar circumstances existent which would merit a new trial.

The case offered against Greenberg is much more tenable than the tenuous evidence presented by the prosecution in *Ledet* and *Newsom*. The affidavits of Alper and Feinberg not, and probably could not, have the potency that the affidavits in *Ledet* and *Newsom* had. In each of those cases there were only three parties involved in a single transaction; the testimony of each was critical and the testimony of those three men was exclusive. Here, while I do not underestimate the effect of the proposed testimony of the affiants, the criminal conduct alleged continued over a long period of time and there were

numerous witnesses and almost innumerable exhibits offered for the jury's consideration. The case did not hinge entirely on the credibility of the testimony of any limited number of men.

In *Lefket* and *Newsom* the affiants conceded their guilt while attempting to exculpate their codefendant. Here Feiner has already been acquitted; Alper has been convicted, but has not in fact admitted his guilt. Post-conviction remedies still lie open to him. In fact, he might be said to be attempting both to blow and to swallow at the same time. If on a new trial of Greenberg, granted because of Alper's affidavit, Greenberg should be acquitted of conspiracy, it is not inconceivable that a motion for a new trial or other post-conviction relief might be made on behalf of Alper based on the argument that no conspiracy has been proven against him.[7]

Even if Alper were to confess complete guilt, the Greenberg motion should still be denied. To all appearances, the three competent and experienced defense counsel were in complete harmony concerning trial tactics and strategy. Greenberg's counsel elected to abandon his motion for severance. It is no answer for him now to argue that even had the motion been granted, there was no assurance that Alper would have been willing to testify. That problem could have been solved by holding the Alper trial first. Counsel made a reasoned choice to abandon the motion for severance and to proceed at a trial of all three defendants.

Furthermore, the Court is aware, as are counsel, of

7. The court is, of course, aware of the fact that Hartsock was named as a co-conspirator. The question remains, however, given the hypothetical whether the jury on this trial can be said to have found a conspiracy between Alper and Hartsock.

the existence of certain evidence which might have had an adverse effect on the defendant's case and which, only because of the failure of Alper to take the stand, was inadmissible. While it is true that this evidence might be used against Alper as a defense witness for Greenberg at a second trial, and that the jury might consider this in assessing his testimony, this stands as no reason why a new trial should be granted. The defense counsel made a reasoned and deliberate choice not to have Alper testify, well knowing that the circumstances presently existent might conceivably come to pass. Alper from the start protested Greenberg's innocence and counsel had the opportunity to have him present his story to the jury. They forewent that opportunity and so have waived it. In no way can Alper be said to have been "unavailable" to testify at Greenberg's trial.

Therefore, it is on this 4th day of December, 1970, ORDERED that the Motions of Defendant Greenberg for a Judgment of Acquittal or in the Alternative for a New Trial be, and the same are hereby denied.

/s/ LAWRENCE A. WHIPPLE, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,366

UNITED STATES OF AMERICA

v.

FRANK ALPER,
STANLEY M. GREENBERG,
MORTON FEINER,
FRANK ALPER, *Appellant*

No. 71-1318

UNITED STATES OF AMERICA

v.

FRANK ALPER,
STANLEY M. GREENBERG,
MORTON FEINER,
STANLEY M. GREENBERG, *Appellant*

(D. C. Criminal 23208)

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 21, 1971

Before SEITZ, *Chief Judge*, GIBBONS and ROSENN, *Circuit Judges*

OPINION OF THE COURT

(Filed September 14, 1971)

GIBBONS, *Circuit Judge*.

Defendant-appellants Alper and Greenberg were indicted on March 20, 1968. The indictment, in twenty-one counts, charged Alper, Greenberg and one Feiner as defendants in a conspiracy count in which one Hartsock is named as a co-conspirator. 18 U.S.C. §371 (1964). It charges Alper, Greenberg and Feiner with twenty counts of mail fraud. 18 U.S.C. §1341 (1964). All three defendants pleaded not guilty and were tried before Judge Lawrence A. Whipple* and a jury in the District Court for the Eastern District of Pennsylvania beginning on March 3, 1970. The conspiracy count and the mail fraud counts all relate to a complicated check kiting scheme involving checking accounts of Alper, Greenberg, Magnum Chemical Corporation, Life Aid Corporation, Trans-Ignition Systems, Inc., Portable Oxygen Corporation and Stellar National Products, Inc. The kite allegedly was run

* United States District Judge, District of New Jersey, sitting by designation.

for the purpose of obtaining money from Central Penn National Bank, Industrial Valley Bank, Philadelphia National Bank and Fidelity Philadelphia Trust Company, all of Philadelphia, and Peoples National Bank of Westmont, New Jersey, First National Bank of Stone Harbor, New Jersey, Cherry Hill National Bank, Cherry Hill, New Jersey, Delaware Valley Bank and Trust Company, Cherry Hill, New Jersey and First National City Bank of New York. Checking transactions alleged to have been made in furtherance of the conspiracy began in September of 1963 and continued until June of 1965, when the kite was discovered by some of the banks.

The corporations against whose accounts checks were drawn were all formed at the behest of Alper to carry on a sales business. Greenberg, an attorney, formed each corporation. He became a director of Magnum and of Life Aid. Several of the corporations paid Greenberg $100 a week, from which federal income taxes and Social Security taxes were withheld. These payments continued until late February 1965. One of Alper's corporations furnished Greenberg with an automobile. Feiner was an accountant hired for the corporations by Alper in March of 1965. The co-conspirator, Hartsock, was an officer of Peoples National Bank, and was charged by the government as being instrumental in concealing the existence of the kite from his own and other banks. Hartsock died before the indictments were returned.

The trial lasted from March 3 to April 28, 1970. The prosecution placed in evidence 148 exhibits consisting primarily of bank records, canceled checks, deposit slips, loan ledgers and checking account statements. Alper and Feiner elected not to testify. Greenberg testified at length about his representation of Alper and Alper's corporations.

He denied that he had any knowledge of Alper's check kiting. After being charged on April 28, 1970, the jury retired to deliberate at 3:20 P.M. The jury recessed its deliberations at 10:15 P.M. on that date. It resumed deliberations at 9:00 A.M. on April 29, and at 10:35 A.M. advised the court that it had reached a verdict on Alper and Feiner but was hopelessly deadlocked as to Greenberg. Alper was found guilty on all counts. Feiner was acquitted on all counts.

Thereafter the court gave the jury a supplemental instruction and directed that it continue deliberation as to Greenberg. Following this supplemental instruction the jury deliberated for approximately an hour and returned a verdict finding Greenberg guilty on count I, the conspiracy count, and not guilty on all other counts. Motions for a new trial and for a judgment of acquittal were denied by the district court on December 4, 1970, and the defendants were sentenced on March 17, 1971. This appeal followed.

I. Alper's contention that the sentence was excessive.

Alper was convicted on twenty-one counts. He was sentenced on count I to imprisonment for five years, and on counts II through XXI to imprisonment for five years to run concurrently with the sentence imposed on count I. He contends that in view of his prior spotless record it was an abuse of discretion for the district court to impose so severe a sentence. The sentence is within the range permitted. 18 U.S.C. §371 (1964); 18 U.S.C. §1341 (1964). Alper has made no effort to have brought to our attention the contents of the pre-sentence investigation report on which the district court relied. Our review of the evidence

convinces us that the sentence was appropriately within the range of discretion for the district court.

II. The district court's denial of motions for a judgment of acquittal at the end of the government's case and at the end of the entire case.

Both defendants contend that the district court erred in failing to grant their motions for a judgment of acquittal.

Alper contends that the government never proved a specific intent to defraud; rather, that he "tried to take advantage of a common business practice, perhaps in a careless way, which eventually grew out of proportion and backfired on him." [1] Reasonable jurymen could conclude from the evidence that Alper was the chief participant in a check kite from October 22, 1964, to March 30, 1965, between Peoples National Bank and First National Bank of Stone Harbor involving 134 checks totaling over $2,000,000; from April 1, 1965, to June 10, 1965, between First National Bank of Stone Harbor and Industrial Valley Bank involving 335 checks totaling more than $4,500,000; from April 27, 1965, to June 23, 1965, between Fidelity Philadelphia Trust Company and First National Bank of Stone Harbor involving 158 checks totaling more than $3,000,000. There were at least four other kites, and the checks involved totaled approximately $12,000,000. Of the corporations whose checking accounts were used, only the Magnum Chemical Corporation checking account was used for ordinary business purposes. The remaining accounts were used primarily if not exclusively for purposes of the various kites. No useful purpose would

1. Appellant's Brief, No. 19,366, p. 10.

be served by a more detailed recital of the evidence. It was clearly sufficient to withstand a motion for a judgment of acquittal and to sustain the jury's verdict against Alper.

Greenberg contends that he was related to Alper and the corporations only as an attorney and that the evidence relied upon by the government is as consistent with his lack of knowledge about and participation in the conspiracy as with guilt. We cannot agree. As with Alper a detailed recital of the evidence would serve no useful purpose. But it could hardly have been proper to grant Greenberg's motion for a judgment of acquittal when the evidence showed that at times when Greenberg, a former director[1a] of several of Alper's corporations, was still on their payroll he drew nine checks on his personal checking account with the Central Penn National Bank in amounts which he then knew were in excess of the account balances payable to Life Aid Corporation, and covered these checks with checks which he then knew were drawn by Alper on a corporate account against uncollected funds. The drawing of three of these checks is alleged as an overt act in the conspiracy count. After Greenberg resigned as a director of the Life-Aid and Magnum corporations, he continued his close business relationship with Alper. He continued to receive and accept weekly payments from Alper's corporations and attempted to help Alper obtain investors and financing. Furthermore, during the time that Alper's corporations were experiencing difficulties with various banks because of overdrafts, Greenberg contacted officials of these

1a. Greenberg resigned from his director's post on June 15, 1963, following his appointment as general counsel for the Pennsylvania Securities Commission and in anticipation of his appointment as a Judge of the Common Pleas in Philadelphia.

banks and interceded on Alper's behalf. From Greenberg's continued close association with Alper, his direct participation in a check kite in the early stages of Alper's manipulations, and his efforts in the later stages to reassure several bankers worried about overdrafts, the jury could reasonably conclude that he was and continued to be a conspirator with Alper in a scheme to defraud. The evidence against him, though not as overwhelming as that against Alper, who played the leading role in this drama of high finance, was clearly sufficient to withstand a motion for a judgment of acquittal and to sustain the jury's verdict against Greenberg.

III. The district court's denial of motions for a new trial.

The appellants contend that various trial errors were so prejudicial as to warrant a new trial. We will consider these contentions separately.

A. The contention that the District Judge read the charge to the jury too rapidly.

Appellants contend that the District Judge charged the jury in a sharp, staccato voice and in an extremely speedy manner, so as to make the charge almost incomprehensible. Everyone else in the courtroom, including the court reporter, apparently was able to comprehend the charge. This contention we reject as frivolous.

B. Greenberg's contention that evidence was erroneously admitted.

The witness Brammer, an officer of the Fidelity Philadelphia Trust Company, testified at trial to receiving a telephone call on July 2, 1965, from a person who identified himself as Stanley M. Greenberg, Alper's attorney. The questions, answers and relevant colloquy are as follows:

> "Q. Mr. Brammer, do you recall any telephone conversations with the defendant Stanley Greenberg?
>
> A. I had a call from a party representing himself as attorney for Mr. Alper, or stating that he was Mr. Greenberg, that no one was going to be hurt, and that a loan was being arranged through the Central Penn National Bank, and if there were any difficulties with any additional checks, which we didn't know about at that time, why, it it would all be taken care of with proceeds from the loan.
>
> Q. During this conversation was any mention made of Mr. Alper's reputation?
>
> A. I can't—I can't remember anything—
>
> Q. Is there anything in your memorandum that would refresh your recollection?
>
> THE COURT: Can you fix the date when the call allegedly came from a person by the name of Greenberg?
>
> THE WITNESS: I can from my notes. Friday afternoon—" (249a).

At this point there was a side bar conference requested by Alper's attorney in which he asked for an offer of proof with respect to the answer to the question about Alper's

reputation. Such an offer of proof was made and Alper's attorney declined to object. Greenberg's attorney did not object. The witness then finished his answer:

"A. Friday afternoon, July 2, 1965—

THE COURT: How about answering the other questions. Can you answer that?

THE WITNESS: Yes.

THE COURT: What is the answer?

THE WITNESS: The answer is, from my notes, I also had an assurance from Mr. Greenberg, attorney for Mr. Alper, that there was no possibility of any one suffering a loss as Mr. Alper's reputation was above reproach." (251a).

The next day Greenberg's attorney cross-examined Brammer and established that Brammer had not originated the call, and had not previously met or spoken to Greenberg. He then moved to strike the testimony as to the telephone conversation on the ground that the caller had not been properly identified. The government attorney contended, first, that by failing to object timely Greenberg had waived this objection, and second, that the contents of the conversation and the surrounding circumstances sufficiently authenticated the identity of the caller. This colloquy took place:

"[ATTORNEY FOR GREENBERG] I am not aware of any other evidence which identified Stanley Greenberg as the maker of that call.

THE COURT: Not identifying, but circumstances surrounding the making of the call, namely, if the Court's notes are in order. After I returned

> from New York he and I called each other'—Mr. Brammer and Mr. Alper—'and we discussed the Girard check, late return for $2,000. I had a call from the attorney saying he was Greenberg, that no one was going to be hurt, a loan was going to be arranged with Central Penn, and any difficulties would be taken care of by that loan.'" (256a).

The substance of the reassuring call to which Brammer testified relates to prior testimony by the witness Kaelin, an officer of Central Penn National Bank. Kaelin had testified that on learning of certain overdrafts he had tried to call Greenberg and succeeded in speaking to Alper, who sought to arrange a date at which Alper and Greenberg would discuss a line of credit at Central Penn. Greenberg had thereafter called Kaelin from Harrisburg. Greenberg was advised by Kaelin of the overdrafts, which Kaelin had agreed to permit, for a short time, to a limit of $30,000. Greenberg assured Kaelin that Alper was a responsible person and that things would work out. (127-133a). There was no question of identification respecting the Kaelin-Greenberg telephone conversation. There was ample evidence that Greenberg had on this and other occasions represented himself to be Alper's attorney.

The district court properly refused to strike Brammer's testimony about the telephone conversation. One defendant, Alper, before that testimony was completed, asked for an offer of proof. He then declined to object, sensing that the testimony would tend to depict his reputation in a favorable light. Another defendant, Greenberg, not only did not object to the initial question, but after a side bar conference permitted further testimony about the conversation. After overnight reflection Green-

berg changed his mind. It would be improper to countenance the practice of withholding a formal objection on the ground of lack of authentication of a telephone caller's identity until after the defendant has had an opportunity to hear and weigh the impact of the testimony.[2]

Moreover it is well settled that telephone calls may be authenticated by circumstantial evidence as well as by direct recognition of the person calling. *E.g., United States v. Frank*, 290 F.2d 195 (3rd Cir. 1961). The circumstances tending to identify Greenberg as the caller include the facts testified to by Kaelin referred to above, and evidence showing that Greenberg made a very similar call to Egner, another worried banker, at about the same time. In *Carbo v. United States*, 314 F.2d 718, 743 (9th Cir. 1963), the Ninth Circuit stated the standard which a trial judge should apply in determining whether a telephone conversation has been adequately authenticated:

> "The issue for the trial judge in determining whether the required foundation for the introduction of the evidence has been established is whether the proof is such that the jury, acting as reasonable men, could find its authorship as claimed by the proponent."

Clearly the jury could so find here.

Greenberg, in his testimony denied the Brammer telephone conversation. The calls to Kaelin and Egner, however, are not disputed. Thus, at most the Brammer call is cumulative of other evidence that at a critical

2. The witness made it clear in answer to counsel's first question on direct that he did not originate the call, and thus an identification problem arose immediately.

period during which the house of cards, or rather of checks, was collapsing Greenberg was reassuring certain worried bankers. We cannot overlook the fact that we are dealing with brief and cumulative testimony in a trial of nine weeks duration presenting voluminous documentary and testimonial evidence. Even if the Brammer testimony should, therefore, have been stricken (or more likely additional evidence of circumstantial corroboration required) the error, if any, produced no substantial prejudice and must be disregarded. Rule 52(b), Fed. R. Crim. P.

C. Greenberg's contention that evidence was erroneously excluded.

The district court declined to admit in evidence financial statements marked defendants' exhibits SMG 16 through 22 inclusive relating to Alper's corporations. Greenberg testified at the trial that these statements, prepared by a certified public accountant but bearing a qualified certification, were the only financial data on the corporations made available to him, and showed that Alper's businesses were prosperous and solvent. Although the accountant testified in the trial he was not asked to authenticate the exhibits in question. The government objected to their admissibility on the ground that they had not been properly authenticated and no effort was made to cure that defect. All of the statements except SMG 22 covered periods prior to June 30, 1963, and SMG 22 covered a period ending June 30, 1964. There were over 150 exhibits already in evidence. These unauthenticated statements might have been used by the jury to draw inferences improperly favorable to the co-defendant Alper or might have led to other confusion. Greenberg

contends that authentication was not relevant to his reliance on the exhibits. *See* 7 Wigmore, *Evidence*, §2132 (3d ed. 1940) and cases cited therein. The district court ruled, however, that in view of Greenberg's testimony that he had received the exhibits and they showed that the companies were doing a profitable business, admission of the statements themselves would be cumulative.[3] In a multidefendant case involving numerous exhibits the trial judge must be vested with a reasonable discretion to exclude cumulative and possibly confusing evidence. 6

3. The colloquy, in the presence of the jury, was as follows:

"MR. CUNNINGHAM: I object, your Honor, on the ground tat [sic] they were not authenticated as being by Mr. Silverstein as being the product of his company, they are not certified copies of financial statements, and the mere fact that they were received by Mr. Greenberg we don't think makes them admissible.

MR. MC CONNELL: They were identified by Greenberg as having been received by him from the company's account.

THE COURT: I don't recall any testimony pertaining thereto the contents of same. Just that these are the only reports he ever received.

MR. MC CONNELL: And that they showed that the companies were going and profitable businesses.

THE COURT: Yes, we had his testimony to that effect. I deny the application of 16, 17, 18, 19, 20, 21, 22—16 through 22 inclusive.

MR. MC CONNELL: Your Honor, if we may go back for just one minute to these financial statements, these show on their face that they were prepared by Natal, Silverstein & Alloyz, they do contain a certification at the front of each that they were prepared by that company, and the defendant Greenberg testified that he received them from these companies, and this was the only financial information.

THE COURT: And that the companies were going businesses and as he knew they were profitable.

MR. MC CONNELL: As shown by these statements.

THE COURT: I think that's enough for this jury. I don't think they should be admitted in light of Judge Greenberg's testimony." (607-608a).

Wigmore, *Evidence*, §1907 (3d ed. 1940). The court's ruling was within the bounds of such discretion.

D. Instructions to the jury out of the presence of the defendants.

Both appellants contend that a new trial should be granted because certain communications were received from the jury and certain instructions given while their counsel, but not they, were present.

The jury retired to deliberate at 3:20 p.m. on April 28. Some time thereafter, at a time which does not appear in the record, the court met in chambers with all defense counsel, the Assistant United States Attorneys, and the Clerk, and read to them a note from the jury as follows:

> "Sir, 1. can we find each defendant guilty or not guilty on each count?
> 2. or must each be found guilty or not guilty on all counts?" (613a).

A discussion followed. The record then discloses:

> "THE COURT: It is hereby agreed by Counsel that the Court shall answer the inquiries as follows:
>
> 'Any defendant can be found guilty or not guilty on each count or any defendant can be found guilty on all counts or not guilty on all counts.'
>
> O.K.?
>
> [GREENBERG'S ATTORNEY]: Just one thing. If you change the word to 'any' in the second half, I don't see it.

[ASSISTANT UNITED STATES ATTORNEY]: Would you call them in, or merely send the reply?
THE COURT: No I will bring them back, or will counsel stipulate that I send it to them in writing?
[GREENBERG'S ATTORNEY]: If you are just going to give that answer, I say send it in and save time." (614-615a).

The court's answer to the jury's questions was then refined slightly, and the court said:

"THE COURT: Let's send this in. Let the record note I am handing it to my law secretary to bring it up to the marshalls outside the jury room." (616a).

The record does not disclose whether Greenberg and Alper were still in the court house, and there is no indication whatever that they were excluded from the discussions in chambers by any action of the court.

Thereafter at 9:25 p.m. on April 28, all defense counsel and the Assistant United States Attorneys again appeared in chambers and the court read a note from the jury forelady as follows:

"Sir, please send exhibit list." (617a).

The court then obtained from the Clerk an exhibit list and suggested that counsel should look at it to determine if, in the description of the list, anything appeared which might be prejudicial to either side. The attorney for Feiner objected that the voluminous list would not be helpful and that a further inquiry of the jury was in order. The

attorney for Alper objected both to furnishing the requested list and to any further inquiry. The attorney for Greenberg agreed that the complete list should be sent to the jury. The Assistant United States Attorney suggested that the list be furnished, but agreed that further inquiry should be made. The following then appears:

> "THE COURT: Whatever they are looking for, we can assist them with the number, whether it be for the government or for the defendant Alper, the defendant Greenberg or the defendant Feiner. I mean this is my own analysis of it because what concerns this Court is this, and frankly, I am very interested in assisting this jury, there are approximately 150 exhibits or 160. I am talking to both sides of this case. And rather than have them go through those exhibits, if I were to send a note back with your consent, counsel, can the Court be of assistance as to any exhibit you are looking for, the Court will designate same gladly—what do you think about that?" (619-620a).

All counsel agreed, and the court sent to the jury the following note:

> "Madam Foreman of the jury, in answer to your inquiry, 'Please send exhibit list,' the Court would respectfully ask in this manner would you please inform the Court what exhibit or exhibits the jury is interested in? Perhaps I can be of assistance" (621a).

All counsel agreed to the text of the note.

At 9:40 the jury returned a note: "Loan ledger cards for S. Greenberg." (621a). These were identified as ex-

hibits G-22A and G-46, and all counsel stipulated that the court send back to the jury the reply: "The Court hereby refers you to Exhibit G-22A and G-46." (623a). It is not disputed that these were the Greenberg loan ledger cards.

As with the in-chambers discussion about the verdict, the record does not disclose whether Greenberg and Alper were still in the court house, and there is no indication whatever that they were excluded from the discussions in chambers by any action of the court.

The appellants frankly acknowledge that error, if any, resulting from their absence from the discussions in chambers is attributable to the action of their counsel. They contend, however, that it is the right of a defendant to be present at all critical stages of the trial, Rule 43, Fed. R. Crim. P., that this right is of constitutional dimensions, Article III, §2 and Sixth Amendment, U.S. Constitution, that it is beyond the authority of counsel to waive this right, *Johnson v. Zerbst*, 304 U.S. 458 (1938), and that the error was not harmless. Rule 52(b), Fed. R. Crim. P.

The government points out that the appellants were given the same opportunity to be present at the meetings in chambers as were their counsel. Counsel for Greenberg reply that counsel were notified to come into chambers, but Greenberg was not so notified either by the court or by counsel.[4] While Rule 43 of the Federal Rules of Criminal Procedure provides that the defendant shall be present at every stage of the trial, that rule adds: "In prosecutions for offenses not punishable by death, the de-

4. The record does not disclose whether the appellants were present in the court house to be told of the jury's inquiries and the ensuing conferences. It is entirely likely that they had, as is often the case, left the court house vigil to their attorneys.

fendant's voluntary absence after trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict." Here, clearly, is an instance in which trial counsel must be assumed to have implied authority to receive notice of a conference respecting inquiries from the jury. The court was entitled to rely upon counsels' performance of their agency duties and to assume that appellants' absence was voluntary.

Appellants point to *United States v. Neal*, 320 F.2d 533 (3rd Cir. 1963), as authority for the impropriety of instructing the jury in the absence of the defendant. The *Neal* case involved a supplemental instruction which in the circumstances was highly prejudicial, and a dispute over whether even defendant's counsel was informed. Compare *United States v. Grosso*, 358 F.2d 154 (3rd Cir. 1965), *reversed on other grounds*, 390 U.S. 62 (1968), applying the harmless error rule to an instruction, in the absence of both defense counsel and the defendant, to continue deliberations. See to the same effect *United States v. Schor*, 418 F.2d 26, 30 (2nd Cir. 1969). *Cf. United States v. Crutcher*, 405 F.2d 239, 244 (2nd Cir. 1968). The preferred practice obviously is to recall the jury and to deliver supplemental instructions in open court. *See ABA, Standards Relating to Trial by Jury*, §5.3 and commentary at 139-145 (Tent. Draft; May 1968). Here the court initially offered to follow the preferred practice of returning the jury to open court for instruction, but counsel suggested a more expeditious procedure. In *Lewis v. United States*, 146 U.S. 370, 374 (1892), there is dicta to the effect that a defendant may not either by himself or by counsel waive his right to be present. But

the very language of the second sentence of Rule 43 recognizes that in some circumstances a trial may proceed in the absence of the defendant. The validity of the *Lewis* dictum must be questioned in view of the subsequent adoption of Rule 43 and of the decision in *Illinois v. Allen*, 397 U.S. 337 (1970). In the circumstances here presented the court was not in error in relying on the authority of defense counsel to act for their client.

Moreover, assuming such reliance to have been misplaced the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). Neither communication to the jury is claimed to be erroneous. That the instruction as to the verdict was understood by the jury is demonstrated by its verdict. It acquitted one defendant on all counts, convicted one defendant on all counts, and found one defendant guilty on one count and not guilty on twenty counts. The inquiry with respect to the exhibit list and the agreed upon reply can hardly be raised to the dignity of an instruction. The exhibits were in the jury room, and their numbering was a housekeeping detail. Appellant Greenberg urges that with his experience he might have suggested a manner of responding to the inquiry about the exhibits that would have been helpful to him but he does not say what or how.[5] We could not reverse on a ground so entirely speculative.

---

5. In Greenberg's brief counsel argues, "Were he present, suggestions he might have made regarding the handling of the exhibit list might have resulted in the list being given to the jury, rather than in the attention of the jury being directed at exhibits relating to him." Appellant's Brief, No. 71-1318, p. 34. In fact his counsel made this very suggestion, but later agreed to the procedure actually followed. The attention of the jury was not, by virtue of the court's note, focused on any exhibit. The note was entirely neutral.

E. Greenberg's objection to the supplemental charge.

The jury deliberated on April 28, 1970, from 3:20 p.m. to approximately 10:05 p.m., when they retired for the night. Deliberation was resumed at 9:00 a.m. on April 29. At 10:35 a.m. the jury advised the court it had reached a verdict on Alper and Feiner but was deadlocked on Greenberg. It took twenty-five minutes to assemble counsel. The court then advised counsel that it would take the verdicts on Alper and Feiner and would confer with counsel for Greenberg thereafter about further instructions. Greenberg's counsel suggested that the jury be discharged. The court, however, took the verdicts as to Alper and Feiner, and advised the jury that it was considering giving further instructions as to Greenberg. In a colloquy between the court, Greenberg's attorney and the Assistant United States Attorney, Greenberg's attorney continued to assert that the jury should be discharged. The court, however, advised the jury that it would continue deliberating and that it would be instructed further after lunch. Greenberg's attorney continued to object. After hearing argument the court then recessed to draft an appropriate supplemental instruction. It then delivered to the jury a supplemental charge in the form suggested in footnote 32 of the opinion by this court in *United States v. Fioravanti*, 412 F.2d 407, 420 (3rd Cir. 1969).[6] To that language it added the sentence:

6. "It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict."

> "Each of you has a duty conscientiously to adhere to his own honest opinion, and there is nothing improper, questionable or contrary to good conscience for a jury finally to remain deadlocked."

In approximately an hour the jury returned a verdict finding Greenberg guilty on count I and not guilty on the other twenty counts.

Greenberg contends that the direction to deliberate further was unduly coercive. Considering that at the time it reported itself deadlocked the jury had been deliberating only seven and a half hours, less time out for meals, and that the trial had lasted nine weeks, we reject this contention. It is true that with the benefit of hindsight the visceral anticipation of Greenberg's attorney as to the outcome of further deliberations was correct. But on the morning of April 29, 1970, for all the court knew a reasonable amount of further deliberation might have produced for Greenberg a verdict of not guilty, and have thus spared both him and the government the ordeal of a retrial.

Greenberg also contends that when in *United States v. Fioravanti, supra*, this court prohibited further use of the Allen charge it intended to prohibit use even of the charge set forth with approval in that opinion as a supplemental charge. This court did not so intend. There will be cases in which a supplemental charge is appropriate. This was such a case.

F. Greenberg's newly available evidence.

Greenberg contends that because the testimony of Alper and Feiner would now be available and would be favorable he should be granted a new trial. The district

court considered this contention and rejected it for reasons which we find cogent.

In support of his motion for a new trial Greenberg presented Feiner's affidavit in which Feiner stated that he would testify as he did before the grand jury which returned the indictments. That testimony was that he had no knowledge of Greenberg's activities. If admissible at a trial at all, such testimony would be of extremely problematical value. Moreover, Feiner did not come into the picture until March of 1965. Thus his knowledge, if any, covers a time much later than that covered by the evidence which is most incriminating against Greenberg: the time when his personal account was used to kite checks with the Life Aid account.

Greenberg also presented Alper's affidavits in which Alper offers to testify that Greenberg had no knowledge of the day to day financial operations of the subject companies except what Alper told him; that he only gave Greenberg financial statements showing profitable business operations; that Greenberg had no access to the corporate financial records; and that Greenberg's only connection with the companies was in legal representation. The government points out, correctly, that there was no evidence that Greenberg had access to the corporate financial records and that Greenberg testified to the contrary. It urges that the testimony would at best be cumulative of Greenberg's own. Undoubtedly this is so. Such testimony from the mastermind of the plot would also have been helpful, especially if Alper proposed, while attempting to exculpate Greenberg, to admit his own guilt. Alper's affidavits do not go that far. Indeed he contends on appeal that he is not guilty.

Assuming, however, that the limited and cumulative testimony which Alper would give would likely be helpful, Greenberg's difficulty is that in the district court he made a tactical decision not to pursue the steps which might have made Alper's testimony available. He made, but later abandoned, a motion for a severance. Had that motion been pursued Alper could have been tried first, and thus have been available to testify. There is no question that the choice to abandon the severance motion was a reasoned tactical decision. Where it is clear that the defendant knew of the existence of evidence and willfully failed to take steps to secure its availability he cannot urge that evidence as a ground for a new trial. *Nelson v. United States*, 415 F.2d 483 (5th Cir. 1969), *cert. denied*, 396 U.S. 1060 (1970), *United States v. Howell*, 240 F.2d 149 (3rd Cir. 1956); *United States v. Rutkin*, 208 F.2d 647 (3rd Cir. 1953); *Brandon v. United States*, 190 F.2d 175 (9th Cir. 1951). The situations presented in *Newsom v. United States*, 311 F.2d 74 (5th Cir. 1962); *Ledet v. United States*, 297 F.2d 737 (5th Cir. 1962); and *Amos v. United States*, 218 F.2d 44 (D.C. Cir. 1954), are not presented by this record.

The judgments of the district court in No. 19,366 and No. 71-1318 will be affirmed.

A True Copy :

Teste :

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,366

UNITED STATES OF AMERICA

v.

FRANK ALPER
STANLEY M. GREENBERG
MORTON FEINER
FRANK ALPER, *Appellant*

No. 71-1318

UNITED STATES OF AMERICA

v.

FRANK ALPER
STANLEY M. GREENBERG
MORTON FEINER
STANLEY M. GREENBERG, *Appellant*

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge*, GIBBONS and ROSENN
Circuit Judges

ORDER

It is ORDERED that the slip opinion in these cases be and the same is hereby amended by the addition to the end of carry over paragraph at the top of page 6 of the following:

> The conspiracy was a matter separate and apart from the substantive offenses. *Pinkerton v. United States*, 328 U.S. 643 (1946); *United States v. Pappas*, 445 F.2d 1194, 1198 (3d Cir. 1971). After a verdict the evidence in support thereof must be viewed in the light most favorable to the government. *United States v. Carlson*, 359 F.2d 592, 597 (3d Cir. 1966).

JOHN J. GIBBONS,
Circuit Judge

Dated: November 2, 1971

A True Copy :

Teste :

Clerk of the United States Court of Appeals for the Third Circuit

SUR PETITION FOR REHEARING

Present: HON. COLLINS J. SEITZ, Chief Judge, and HON. FRANCIS J. VAN DUSEN, HON. RUGGERO J. ALDISERT, HON. ARLIN M. ADAMS, HON. JOHN J. GIBBONS, HON. MAX ROSENN, Circuit Judges

The petition for rehearing filed by

appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
/s/ JOHN J. GIBBONS
Judge.

Dated: November 2, 1971.

STANLEY M. GREENBERG

COUNT	DESCRIPTION	VERDICT	
ALL COUNTS		NOT GUILTY GUILTY	____ ____
I	Conspiracy Indictment pp. 1-18	NOT GUILTY GUILTY	CR X
II	Mail Fraud - 4/27/65 Indictment pp. 19-38	NOT GUILTY GUILTY	X ____
III	Mail Fraud - 4/28/65 Indictment p. 39	NOT GUILTY GUILTY	____ ____
IV	Mail Fraud - 5/3/65 Indictment p. 39	NOT GUILTY GUILTY	____ ____
V	Mail Fraud - 5/6/65 Indictment p. 40	NOT GUILTY GUILTY	____ ____
VI	Mail Fraud - 5/13/65 Indictment p. 40	NOT GUILTY GUILTY	X ____
VII	Mail Fraud - 5/6/65 Indictment p. 41	NOT GUILTY GUILTY	X ____
VIII	Mail Fraud - 5/14/65 Indictment p. 41	NOT GUILTY GUILTY	____ ____
IX	Mail Fraud - 5/18/65 Indictment p. 42	NOT GUILTY GUILTY	X ____
X	Mail Fraud - 6/17/65 Indictment p. 42	NOT GUILTY GUILTY	X ____
XI	Mail Fraud - 6/17/65 Indictment p. 43	NOT GUILTY GUILTY	X ____
XII	Mail Fraud - 6/17/65 Indictment p. 43	NOT GUILTY GUILTY	X ____
XIII	Mail Fraud - 6/23/65 Indictment p. 44	NOT GUILTY GUILTY	X ____
XIV	Mail Fraud - 6/23/65 Indictment p. 44	NOT GUILTY GUILTY	X ____
XV	Mail Fraud - 6/29/65 Indictment p. 45	NOT GUILTY GUILTY	X ____
XVI	Mail Fraud - 6/30/65 Indictment p. 45	NOT GUILTY GUILTY	X ____
XVII	Mail Fraud - 6/30/65 Indictment p. 46	NOT GUILTY GUILTY	X ____
XVIII	Mail Fraud - 6/30/65 Indictment p. 47	NOT GUILTY GUILTY	X ____
XIX	Mail Fraud - 11/20/64 Indictment p. 47	NOT GUILTY GUILTY	X ____
XX	Mail Fraud - 12/18/64 Indictment p. 48	NOT GUILTY GUILTY	X ____
XXI	Mail Fraud - 3/5/65 Indictment p. 48	NOT GUILTY GUILTY	X ____

No. 71-853

In the Supreme Court of the United States

OCTOBER TERM, 1971

STANLEY M. GREENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys,
Department of Justice,
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-853

STANLEY M. GREENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15a-39a) is reported at 449 F. 2d 1223. The opinion of the district court (Pet. App. 1a-14a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1971, and a petition for rehearing was denied on November 2, 1971. On December 1, 1971, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to January 1, 1972, and the petition was filed on December 31, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

457-835—72——1